THIS BOOK
MUST NOT BE REMOVED
FROM THE LIBRARY

UNIVERSITY OF LONDON LIBRARY

REFERENCE ONLY

REFERENCE ONLY

346.4
Mx. North Gall.

THE

INCORPORATED COUNCIL OF LAW REPORTING

FOR

ENGLAND AND WALES.

Members of the Council.

Chairman—C. M. Warmington, Esq., K.C.
Vice-Chairman—F. A. Bosanquet, Esq., K.C.

EX-OFFICIO MEMBERS.

Sir John Lawson Walton, M.P. . . Attorney-General.
Sir William S. Robson, M.P. . . Solicitor-General.
Henry Attlee, Esq., President of the Law Society.

ELECTED MEMBERS.

P. Ogden Lawrence, Esq., K.C. A. R. Kirby, Esq.	Lincoln's Inn.
F. A. Bosanquet, Esq., K.C. W. Pickford, Esq., K.C.	Inner Temple.
C. M. Warmington, Esq., K.C. C. C. Scott, Esq.	Middle Temple.
J. C. Lewis Coward, Esq., K.C. H. E. Duke, Esq., K.C.	Gray's Inn.
W. English Harrison, Esq., K.C., of the Middle Temple. Robert F. Norton, Esq., K.C., of Lincoln's Inn.	Appointed by the Council of Law Reporting on the nomination of the General Council of the Bar.
Sir John Hollams, Knt. (Firm—Messrs. Hollams, Sons, Coward & Hawksley). E. J. Bristow, Esq. (Firm—Messrs. Wilson, Bristows & Carpmael).	The Law Society.

Secretary—P. Noble Fawcett, Esq., 10, Old Square, Lincoln's Inn, London, W.C.

1906.

THE

LAW REPORTS

OF THE INCORPORATED COUNCIL OF LAW REPORTING.

HOUSE OF LORDS,

JUDICIAL COMMITTEE OF THE PRIVY COUNCIL,

AND

PEERAGE CASES.

EDITOR—SIR FREDERICK POLLOCK, BART., *Barrister-at-Law.*
ASSISTANT EDITOR—A. P. STONE, *Barrister-at-Law.*

REPORTERS.

House of Lords—English and Irish Appeals and Peerage Cases	J. M. MOORSOM, K.C.	
House of Lords—Scottish and Divorce Appeals and Scottish Peerage Cases	GERALD J. WHEELER,	*Barrister-at-law.*
Privy Council Appeals (including Appeals from Ecclesiastical Courts)	HERBERT COWELL,	*Barrister-at-law.*

1906.

LONDON:

Printed for the Council of Law Reporting

BY BRADBURY, AGNEW, & CO. LD., OF 10, BOUVERIE STREET, E.C.

And Published

BY THE COUNCIL AT 10, OLD SQUARE, LINCOLN'S INN, W.C.

BIBL. LONDIN UNIV.

JUDGES AND LAW OFFICERS.

MEMORANDA.

1905.

Dec. 11. *The Great Seal was delivered to* The Right Honourable Sir Robert Threshie Reid, G.C.M.G., *and he took the oath of office as Lord Chancellor of Great Britain. He was afterwards created a Peer by the title of* Baron Loreburn *of Dumfries in the county of Dumfries.*

The Honourable Sir Alfred Wills *was sworn of the Privy Council.*

Dec. 14. John Lawson Walton, Esq., K.C., *was appointed Attorney-General,* William Snowdon Robson, Esq., K.C., *Solicitor-General; and they received the honour of knighthood.*

1906.

Jan. 9. The Honourable Mr. Justice (Henry) Sutton *received the honour of knighthood.*

Jan. 25. John Fletcher Moulton, Esq., K.C., *was appointed a Lord Justice of the Court of Appeal in the place of* The Right Honourable Sir James Charles Mathew, *who resigned his office on account of ill health.* Lord Justice Moulton *was afterwards knighted and sworn of the Privy Council.*

In the vacation after Easter Sittings, The Right Honourable Sir James Stirling *resigned his office as one of the Lords Justices of the Court of Appeal.*

June 11. The Honourable Sir George Farwell, *one of the Justices of the High Court of Justice, was appointed a Lord Justice of Appeal in the place of* Sir James Stirling, *and was afterwards sworn of the Privy Council.*

June 12. Ralph Neville, Esq., K.C., *was appointed one of the Justices of the High Court of Justice in the place of* Sir George Farwell, *and was afterwards knighted.*

In the vacation before Michaelmas Term, The Right Honourable Sir Robert Romer *resigned his office as one of the Lords Justices of Appeal.*

Oct. 24. The Honourable Sir Henry Burton Buckley, *one of the Justices of the High Court of Justice, was appointed a Lord Justice of Appeal in the place of* Sir Robert Romer, *and* Robert John Parker, Esq., *was appointed one of the Justices of the High Court of Justice, and was afterwards knighted.*

ERRATA.

Page.	*Line.*	*For.*	*Read.*
29	foot-note (2)	[1904] A. C. 343	[1904] A. C. 342.
50	,, (1)	(1881) 14 Q. B. D.	(1851) 14 Q. B.
94	,, (3)	4 A. C.	4 App. Cas.
94	,, (7)	L. R. (Ir.) 5 Ch. and 9 Ch.	5 L. R. Ir. and 9 L. R. Ir.
95	,, (1)	1 Jones & Lat. 34	1 J. & Lat. 36.
149	4 of column 1 of foot-note	*Attorney-General* v. *Dean of Winchester*	*Attorney-General* v. *Dean of Windsor.*
255	foot-notes (1) (4)	Y. & C.	Y. & C. Ch.
258	,, (1)		
260	,, (2)		
255	12 from bottom	*Clark* v. *Laurie*	*Clerk* v. *Laurie.*
259	14 from top	Sir L. Shadwell	Sir J. L. Knight Bruce.
422	13 from bottom	*Van Heyden* v. *Neustadt*	*Von Heyden* v. *Neustadt.*
426	3 ,, ,,	*Van Heyden* v. *Newstadt*	*Von Heyden* v. *Neustadt.*
429	9 ,, ,,	FitzMaurice	Fitzmaurice.
440	foot-note (6)	5 P. C.	L. R. 5 P. C.
539	4 from top	1892	1902.
561	foot-note (1)	4 Bing. N.C.	4 Bing.
562	,, (16)		
563	,, (3)		
565	,, (1)		

The Mode of Citation of the Volumes of the *Law Reports*, commencing January 1, 1906, will be as follows:—

In the First Series,
[1906] 1 Ch. [1906] 2 Ch.

In the Second Series,
[1906] 1 K. B. [1906] 2 K. B. [1906] P.

In the Third Series,
[1906] A. C.

The Scottish Law Reports are cited as follows:—

Shaw, or, First Series Court of Session Cases	by	S.
Dunlop, or, Second Series ,, ,, ,,	,,	D.
Macpherson, or, Third Series ,, ,,	,,	M.
Rettie, or, Fourth Series ,, ,, ,,	,,	R.
Fraser, or, Fifth Series ,, ,, ,,	,,	F.
Scottish Law Reporter ,, ,, ,,	,,	S. L. R.
Morison's Dictionary, or, the Collection of Old Cases	,,	Mor. Dict.

A TABLE

OF THE

NAMES OF THE CASES REPORTED

IN THIS VOLUME.

A.

	PAGE
Alex. Pirie & Sons, Ld. *v.* Kintore (Earl) – – H. L. (Sc.)	478
Alianza Company *v.* Bell H. L. (E.)	18
Ashton Gas Company *v.* Attorney-General – – H. L. (E.)	10
Attorney-General, Ashton Gas Company *v.* – H. L. (E.)	10
———, Paddington Corporation *v.* – H. L. (E.)	1
Attorney-General for British Columbia *v.* Attorney-General for Canada – – P. C.	552
v. Canadian Pacific Railway Company – – – P. C.	204
Attorney-General for Canada, Attorney-General for British Columbia *v.* – – P. C.	552
v. Cain – – – P. C.	542

PAGE

Attorney-General for Canada *v.* Gilhula – – – P. C. 542
Azam Sakarlal Chhotamlal, Hemchand Devchand *v.* – P. C. 212

B.

Back *v.* Dick Kerr & Co., Ld. H. L. (E.) 325
Badische Anilin und Soda Fabrik *v.* Hickson – H. L. (E.) 419
Baily, British Equitable Assurance Company *v.*– H. L. (E.) 35
Baudains *v.* Richardson – P. C. 169
Beauclerk, Paquin, Ld. *v.* H. L. (E.) 148
Bell, Alianza Company *v.* H. L. (E.) 18
Bishop Auckland Industrial Co-operative Company, Butterknowle Colliery Company *v.* H. L. (E.) 305
Boston Fruit Company *v.* British and Foreign Marine Insurance Company – – H. L. (E.) 336
British and Foreign Marine Insurance Company, Boston Fruit Company *v.* – H. L. (E.) 336
British Equitable Assurance Company *v.* Baily – H. L. (E.) 35
Brown, Victorian Railway Commissioners *v.* – – P. C. 381
Butterknowle Colliery Company *v.* Bishop Auckland Industrial Co-operative Company H. L. (E.) 305

C.

Cain, Attorney-General for Canada *v.* – – – P. C. 542
Canadian Pacific Railway Company, Attorney-General for British Columbia *v.* – P. C. 204
Cantin, Montreal City *v.* – P. C. 241
Cavalier *v.* Pope – H. L. (E.) 428
Charlesworth *v.* Watson H. L. (E.) 14
Clouston & Co., Ld. *v.* Corry P. C. 122
Colonial Bank of Australasia *v.* Marshall – – – P. C. 559

PAGE

Colonial Sugar Refining Company *v.* Irving – – – P. C. 360
Commissioner of Taxes for New Zealand *v.* Eastern Extension Australasia and China Telegraph Company – – P. C. 526
Corry, Clouston & Co., Ld. *v.* P. C. 122
Coster *v.* Headland – H. L. (E.) 286
Crutchley, Elliott *v.* H. L. (E.) 7
Curtis *v.* Old Monkland Conservative Association H. L. (Sc.) 86

D.

De Beers Consolidated Mines, Ld. *v.* Howe – H. L. (E.) 455
Denaby and Cadeby Main Collieries, Ld. *v.* Yorkshire Miners' Association – H. L. (E.) 384
Dick Kerr & Co., Ld., Back *v.* H. L. (E.) 325
Dundee Coal Company *v.* Minister of Agriculture of the Colony of Natal – – P. C. 511
Durham Joint Committee, Garbutt *v.* – – H. L. (E.) 291

E.

Eastern Extension Australasia and China Telegraph Company, Commissioner of Taxes for New Zealand *v.* – – P. C. 526
Elliott *v.* Crutchley – H. L. (E.) 7
Emmerson *v.* Maddison – P. C. 569
End, Lewin *v.* – H. L. (E.) 299

F.

Forfarshire County Council, Inverarity *v.* – – H. L. (Sc.) 354
Frith *v.* Frith – – P. C. 254

G.

Garbutt *v.* Durham Joint Committee – – H. L. (E.) 291
Gaskell, Huntly (Marchioness) *v.* H. L. (Sc.) 56

PAGE

George D. Emery Company *v.* Wells – – – P. C. 515
Gilhula, Attorney-General for Canada *v.* – – – P. C. 542
Glasgow Parish Council, Kilmalcolm Parish Council *v.* H. L. (Sc.) 344
Goldberg, Trimble *v.* – P. C. 494
Gondal (State of), Kotda-Sangani (Taluka of) *v.* – P. C. 212
Grand Trunk Railway Company of Canada, Miller *v.* – P. C. 187
Great Fingall Consolidated, Ruben *v.* – – H. L. (E.) 439
Grieve *v.* Tasker – – P. C. 132
Guthridge (N.), Ld., Wilfley Ore Concentrator Syndicate, Ld. *v.* P. C. 548

H.

Harrison, William Cory & Son, Ld. *v.* – – H. L. (E.) 274
Hawthorn Corporation *v.* Kannuluik – – – P. C. 105
Headland, Coster *v.* H. L. (E.) 286
Hemchand Devchand *v.* Azam Sakarlal Chhotamlal – P. C. 212
Hickson, Badische Anilin und Soda Fabrik *v.* – H. L. (E.) 419
Hills, Public Works Commissioner *v.* – – – P. C. 368
Howe, De Beers Consolidated Mines, Ld. *v.* – H. L. (E.) 455
Hunslet Union Assessment Committee, Kirby *v.* H. L. (E.) 43
Huntly (Marchioness) *v.* Gaskell H. L. (Sc.) 56

I.

Inland Revenue Commissioners, Underground Electric Railways Company of London, Ld. *v.* – – H. L. (E.) 21
Inverarity *v.* Forfarshire County Council – – H. L. (Sc.) 354
Irving, Colonial Sugar Refining Company *v.* – – P. C. 360

J.

PAGE

Johnson *v.* Marshall, Sons & Co., Ld. – – – H. L. (E.) 409

K.

Kannuluik, Hawthorn Corporation *v.* – – – P. C. 105
Kilmalcolm Parish Council *v.* Glasgow Parish Council H. L. (Sc.) 344
Kintore (Earl), Alex. Pirie & Sons, Ld. *v.* – H. L. (Sc.) 478
Kirby *v.* Hunslet Union Assessment Committee – H. L. (E.) 43
Kotda-Sangani (Taluka of) *v.* Gondal (State of)– – P. C. 212

L.

L'Association de Bienfaisance et de Retraite de la Police de Montréal, Lapointe *v.* – P. C. 535
Lapointe *v.* L'Association de Bienfaisance et de Retraite de la Police de Montréal – P. C. 535
Lewin *v.* End – H. L. (E.) 299
London Corporation *v.* Netherlands Steamboat Company H. L. (E.) 263
London (Ontario) Water Commissioners, Saunby *v.* – P. C. 110

M.

Macleay *v.* Tait – H. L. (E.) 24
Maddison, Emmerson *v.* – P. C. 569
Manchester Carriage and Tramways Company, Ld. *v.* Swinton and Pendlebury Urban Council – – H. L. (E.) 277
Marshall, Colonial Bank of Australasia *v.* – – P. C. 559
Marshall, Sons & Co., Ld., Johnson *v.* – – H. L. (E.) 409
Miller *v.* Grand Trunk Railway Company of Canada – P. C. 187
Minister of Agriculture of the Colony of Natal, Dundee Coal Company *v.* – – P. C. 511

PAGE

Montreal and St. Lawrence Light and Power Co., Robert *v.* P. C. 196
Montreal City *v.* Cantin – P. C. 241
——————, Montreal Street Railway Company *v.* – P. C. 100
Montreal Street Railway Company *v.* Montreal City – P. C. 100

N.

National Association of Operative Plasterers *v.* Smithies H. L. (E.) 434
Netherlands Steamboat Company, London Corporation *v.* H. L. (E.) 263
Newbold, Samuel *v.* H. L. (E.) 461
North's Navigation Collieries (1889), Ld., Williams *v.* H. L. (E.) 136
Norton *v.* Taylor – – P. C. 378

O.

Old Monkland Conservative Association, Curtis *v.* H. L. (Sc.) 86

P.

Paddington Corporation *v.* Attorney-General H. L. (E.) 1
Paquin, Ld. *v.* Beauclerk H. L. (E.) 148
Permanent Trustee Company of New South Wales, Ld., Williams *v.* – – P. C. 249
Pope, Cavalier *v.* – H. L. (E.) 428
Public Works Commissioner *v.* Hills – – – P. C. 368

R.

Registrar of Titles, Spencer *v.* P. C. 503
Richardson, Baudains *v.* – P. C. 169
Robert, Montreal and St. Lawrence Light and Power Company *v.* – – – P. C. 196

PAGE

Ruben *v.* Great Fingall Consolidated – – – H. L. (E.) 439

S.

Samuel *v.* Newbold H. L. (E.) 461
Saunby *v.* London (Ontario) Water Commissioners – P. C. 110
Smithies, National Association of Operative Plasterers *v.* H. L. (E.) 434
Somerville, Van Eijck and Zoon *v.* – – H. L. (Sc.) 489
Spencer *v.* Registrar of Titles P. C. 503
Strong & Co. of Romsey, Ld. *v.* Woodifield – – H. L. (E.) 448
Sutherland *v.* Thomson H. L. (Sc.) 51
Swinton and Pendlebury Urban Council, Manchester Carriage and Tramways Company, Ld. *v.* H. L. (E.) 277

T.

Table Cape Marine Board, Van Diemen's Land Company *v.* P. C. 92
Tait, Macleay *v.* – H. L. (E.) 24
Tasker, Grieve *v.* – – P. C. 132
Taylor, Norton *v.* – – P. C. 378
Thomson, Sutherland *v.* H. L. (Sc.) 51
Toronto Corporation, Toronto Railway Company *v.* – P. C. 117
Toronto Railway Company *v.* Toronto Corporation – P. C. 117
Trimble *v.* Goldberg – P. C. 494

U.

Underground Electric Railways Company of London, Ld. *v.* Inland Revenue Commissioners H. L. (E.) 21

V.

Van Diemen's Land Company *v.* Table Cape Marine Board P. C. 92

	PAGE
Van Eijck and Zoon *v.* Somerville – – – H. L. (Sc.)	489
Victorian Railway Commissioners *v.* Brown – – – P. C.	381

W.

Watson, Charlesworth *v.* H. L. (E.)	14
Wells, George D. Emery Company *v.* – – – P. C.	515
White (J. & M.), White & Sons *v.* – – – H. L. (Sc.)	72
White & Sons *v.* J. & M. White H. L. (Sc.)	72
Wilfley Ore Concentrator Syndicate, Ld. *v.* N. Guthridge, Ld. P. C.	548
William Cory & Son, Ld. *v.* Harrison – – H. L. (E.)	271
Williams *v.* North's Navigation Collieries (1889), Ld. H. L. (E.)	136
——— *v.* Permanent Trustee Company of New South Wales, Ld. – – – – P. C.	249
Woodifield, Strong & Co. of Romsey, Ld. *v.* – H. L. (E.)	448

Y.

Yorkshire Miners' Association, Denaby and Cadeby Main Collieries, Ld. *v.* – H. L. (E.)	384

TABLE OF CASES CITED.

A.

		PAGE
Abinger (Lord) *v.* Ashton	L. R. 17 Eq. 358	15
Adam, In re	1 Moo. P. C. 460	546
Adamson *v.* Barbour	1 Macq. 376	348
Adelphi Bank *v.* Edwards	26 Sol. J. 360	562
Alabaster *v.* Harness	70 L. T. 375	435
Alianza Company *v.* Bell	[1906] A. C. 18	450
Allcock *v.* Hall	[1891] 1 Q. B. 444	123, 157
Allen *v.* Flood	[1898] A. C. 1	400
Allhusen *v.* Labouchere	3 Q. B. D. 654	436
Amor *v.* Fearon	9 Ad. & E. 548	123
Anderson, Ex parte	1 N. S. W. L. R. 338	380
Anglo-American British Electric Light Corporation *v.* King, Brown & Co.	[1892] A. C. 367	549
Archer *v.* James	2 B. & S. 61; 31 L.J. (Q.B.) 153	137
Arrow Shipping Company *v.* Tyne Improvement Commissioners	[1894] A. C. 508	251
Asher *v.* Whitlock	L. R. 1 Q. B. 1	572
Ashton Gas Company *v.* Attorney-General	[1906] A. C. 10	449
Atkin *v.* Acton	4 C. & P. 208	124
Atkins *v.* Curwood	7 C. & P. 756	158
Atkinson *v.* Lumb	[1903] 1 K. B. 861	326
Attorney-General *v.* Alexander	L. R. 10 Ex. 20	455
——— *v.* British Museum Trustees	[1903] 2 Ch. 598	96
——— *v.* Dorking Guardians	20 Ch. D. 595	106
——— *v.* Hanmer	27 L. J. (Ch.) 837	94
——— *v.* London Corporation	2 Mac. & G. 247	573
——— *v.* Portsmouth	25 W. R. 559	96
——— *v.* Pottinger	30 L. J. (Ex.) 284; 6 H. & N. 733	65
——— *v.* Windsor (Dean of)	8 H. L. C. 369	149
Attorney-General for Canada *v.* Attorney-General for Ontario	[1898] A. C. 700	206
Australian Newspaper Company *v.* Bennett	[1894] A. C. 284	124
Aylesford (Earl) *v.* Morris	L. R. 8 Ch. 484	462

B.

Badische Anilin und Soda Fabrik *v.* Basle Chemical Works	[1898] A. C. 200	420
Badman, Ex parte	45 Ch. D. 16	198

		PAGE
Bahia and San Francisco Railway Company, In re	L. R. 3 Q. B. 584	440
Baillie *v.* Saltoun (Lady)	1 S. (1st ed.) p. 227 ; (2nd ed.) p. 216	481
Balkis Consolidated Company *v.* Tomkinson	[1893] A. C. 396	440
Bank of Augusta *v.* Earle	13 Peters (U. S.), 519	456
Bank of England *v.* Vagliano Brothers	[1891] A. C. 107	251, 562
Bank of Ireland *v.* Evans' Charities	5 H. L. C. 389	441, 562
Barnacle *v.* Clark	[1900] 1 Q. B. 279	380
Barry *v.* Butlin	2 Moo. P. C. 483	171
Barwick *v.* English Joint Stock Bank	L. R. 2 Ex. 259	440
Baxendale *v.* Bennett	3 Q. B. D. 525	562
Bealey *v.* Shaw	6 East, 208	81
Beamish *v.* Beamish	9 H. L. C. 274	149
Beaufort (Duke) *v.* Swansea Corporation	3 Ex. 413	94
Beetham *v.* Crewdson	55 J. P. 55	138
Belfast Dock Act, In re	Ir. R. 1 Eq. 128	94
Bell *v.* Dudley (Earl of)	[1895] 1 Ch. 182	307
—— *v.* Kennedy	L. R. 1 H. L. Sc. 307	64
Bennet *v.* Bennet	43 L. T. 246	462
Bentley *v.* Griffin	5 Taunt. 356	167
Blackett *v.* Bradley	1 B. & S. 940	308
Blackstone Manufacturing Company *v.* Blackstone (Inhabitants)	13 Gray (Mass.), 488	456
Bloomer *v.* Bernstein	43 L. J. (C.P.) 375	517
Boston Deep Sea Fishing Company *v.* Ansell	39 Ch. D. 339	123
Bowes *v.* Heaps	3 V. & B. 117	471
Boyse *v.* Rossborough	6 H. L. C. 2	169
Brew *v.* Haren	Ir. R. 9 C. L. 29	94
Brickwood & Co. *v.* Reynolds	[1898] 1 Q. B. 95	449
Brierley Hill Local Board *v.* Pearsall	9 App. Cas. 595	106
British Mutual Banking Company *v.* Charnwood Forest Railway Company	18 Q. B. D. 714	440
Brooks *v.* Brooks' Trustees	4 F. 1014	56
Brown *v.* McLachlan	L. R. 4 P. C. 543	251
Buccleuch (Duke of) *v.* Wakefield	L. R. 4 H. L. 377	307
Buchanan *v.* Andrew	L. R. 2 H. L. Sc. 286	307
Budgett, In re	[1894] 2 Ch. 557	251

C.

Calcutta Jute Mills *v.* Nicholson	1 Ex. D. 428	458
Calder *v.* Dobell	L. R. 6 C. P. 486	157
Caldwell *v.* Dempster	10 R. 1263	347
—— *v.* Maclaren	9 App. Cas. 392	111
Calmady *v.* Rowe	6 C. B. 861	94
Cameron *v.* Kyte	3 Knapp, 332	546
Campbell *v.* Hall	1 Cowper, 204	546
Canadian Pacific Railway Company *v.* Notre Dame de Bonsecours (Corporation of)	[1899] A. C. 367	206
—— *v.* Parke	[1899] A. C. 535	107, 111
Carmichael's Case	[1896] 2 Ch. 643	255
Carringtons, Limited *v.* Smith.	[1906] 1 K. B. 79	463
Carslake *v.* Caulfield (President of)	17 Vict. L. R. 560	106

		PAGE
Cartwright *v.* Green	8 Ves. 405	435
Cassels *v.* Somerville	12 R. 1155	349
——— *v.* Stewart	6 App. Cas. 64.	501
Cesena Sulphur Company *v.* Nicholson	1 Ex. D. 428	458
Chambers *v.* Whitehaven Harbour Commissioners	[1899] 2 Q. B. 132	327
Chapman *v.* Auckland Union	23 Q. B. D. 294	112
Charkieh, The	L. R. 4 A. & E. 59	221
Chawner *v.* Cummings.	8 Q. B. 311	137
Chesterfield (Earl) *v.* Janssen	2 Ves. Sen. 125	462
Cheyne *v.* M'Gungle	22 D. 1490	54
City of London Contract Corporation *v.* Styles	2 Tax Cases, 244	451
City of London Electric Lighting Company *v.* London Corporation	[1903] A. C. 434	380
Clements *v.* London and North Western Railway Company	[1894] 2 Q. B. 482	190
Clergue *v.* Murray	[1903] A. C. 521	381
Clerk *v.* Laurie	2 H. & N. 199.	255
Clifford *v.* Turrell	1 Y. & C. Ch. 138	255
Clough *v.* London and North Western Railway Company	L. R. 7 Ex. 26	343
Clydebank Engineering and Shipbuilding Company *v.* Don José Ramos Yzquierdo y Castaneda	[1905] A. C. 6.	371
Colac (President of) *v.* Summerfield	[1893] A. C. 187.	106
Colquhoun *v.* Brooks	14 App. Cas. 493.	457
Coltness Iron Company *v.* Black	6 App. Cas. 315	449
——— *v.* ———	1 Tax Cases, 305	450
Commissioner of Taxes *v.* Kauri Timber Company	24 N. Z. L. R. 18	630
——— *v.* Kirk	[1900] A. C. 588	530
Commissioners for Income Tax *v.* Pemsel	[1891] A. C. 531	362
Consett Waterworks Company *v.* Ritson	22 Q. B. D. 318, 702.	307, 314
Consumers Cordage Company *v.* Connolly	June 27, 1901	383
Cooper, Ex parte	26 Ch. D. 693	137
Cotton *v.* Wood	8 C. B. (N.S.) 568	410
County of Gloucester Bank *v.* Rudry Merthyr Steam and House Coal Colliery Company	[1895] 1 Ch. 629	441
Cowley *v.* Newmarket Local Board	[1892] A. C. 345	106
Criminal Code Sections relating to Bigamy, In re	27 Sup. Ct. Can. Rep. 461	543
Croysdale *v.* Sunbury-on-Thames Urban Council	[1898] 2 Ch. 515	107
Cumming *v.* Munro	12 S. 61	54
Curry *v.* Benalla (President of)	21 Vict. L. R. 159	107

D.

Daily Telegraph Newspaper Company *v.* McLaughlin	[1904] A. C. 777	382
Damodhar Gordhan *v.* Deoram Kanji	1 App. Cas. 332; 3 Ind. Ap. 102	217
Daniel *v.* Coulsting	7 M. & G. 122	300
Davey, Paxman & Co. *v.* Landslaagte Star Company	16 Cape Law Journal, p. 57	371
Davis *v.* Treharne	6 App. Cas. 460	307

		PAGE
Dean *v.* MacDowell	8 Ch. D. 345	501
Debenham *v.* Mellon	5 Q. B. D. 394; 6 App. Cas. 24	157
Debtor, In re a	[1903] 1 K. B. 705	461
Devonshire (Duke) *v.* Pattinson	20 Q. B. D. 263	94
Dixon *v.* White	8 App. Cas. 833	313
——— *v.* Yates	5 B. & Ad. 313	424
Doe *v.* Cooke	7 Bing. 346	572
—— *v.* Finn	1 App. Cas. Q. B. 70	572
—— *v.* Morris	2 Bing., N. C. 189	571
—— *v.* Pearson	5 N. B. (3 Kerr) 135	572
—— *v.* Vernon	4 N. B. (2 Kerr) 351	570
—— *v.* Wilson	10 Moo. P. C. 502	94
Doherty *v.* Wellington Education Board	4 N. Z. Jur. (N.S.) 78	123
Donaldson *v.* M'Clure	20 D. 307	66
Donegani *v.* Donegani	3 Knapp, 63	546
Douglas *v.* Douglas	L. R. 12 Eq. 617	64
Dowtie's Case	3 Rep. 10 a; 1 Leon. 21	572
Dublin, Wicklow and Wexford Railway Company *v.* Slattery	3 App. Cas. 1155	410
Duck *v.* Tower Galvanizing Company	[1901] 2 K. B. 314	441
Dufaur *v.* Croft	3 Moo. P. C. 136	171
Duncombe *v.* Brighton Club Company	L. R. 10 Q. B. 371	118
Dunlop Pneumatic Tyre Company *v.* Actien-Gesellschaft für Motor und Motorfahrzeugbau vorm. Cudell & Co.	[1902] 1 K. B. 342	456
Dyer *v.* Munday	[1895] 1 Q. B. 742	441

E.

Earl *v.* Lubbock	[1905] 1 K. B. 253	432
East Anglian Railways Company *v.* Lythgoe	20 L. J. (C. P.) 84	122
East India Company *v.* Campbell	1 Ves. Sen. 247	435
——— *v.* Syed Ally	7 Moo. Ind. App. 555	227
Eastern Steamship Company *v.* Smith	[1891] A. C. 310	168
Eddington *v.* Borman	4 T. R. 4	271
Edgington *v.* Fitzmaurice	29 Ch. D. 459	429
Edye *v.* Robertson	112 U. S. 580	362
Elmslie *v.* Boursier	L. R. 9 Eq. 217	422
Empress *v.* Keshub Mahajun	I. L. R. 8 Calc. 985	218
Erichsen *v.* Last	7 Q. B. D. 12; 8 Q. B. D. 414	457, 526, 533

F.

Fairbairn *v.* Neville	25 R. 192	64
Falkirk Parish *v.* Govan Parish	2 F. 998	348
Falle *v.* Godfray	14 App. Cas. 70	171
Featherstonhaugh *v.* Fenwick	17 Ves. 298	495
Fenn *v.* Miller	[1900] 1 Q. B. 788	327
Ferguson *v.* Grand Trunk Railway	Quebec Rep. 20 Superior Court, 54	190
Fillieul *v.* Armstrong	7 Ad. & E. 557	123
Finlayson *v.* Innes	4 Pat. App. 443	54
Fisher *v.* Keane	11 Ch. D. 353	537
——— *v.* Owen	8 Ch. D. 645	435
Fletcher *v.* United London Tramways	[1902] 2 K. B. 269	326
Forbes (Lord) *v.* Leys, Masson & Co.	5 W. & S. 384	481

		PAGE
Forbes *v.* Marshall	13 D. 1057	348
Francis *v.* Turner Brothers	[1900] 1 Q. B. 478	327
Franconia, The	3 P. D. 164	490
Freemantle Corporation *v.* Annois	[1902] A. C. 213	106
Freeth *v.* Burr	L. R. 9 C. P. 208	517
Fulton *v.* Andrew	L. R. 7 H. L. 448	179

G.

Geddis *v.* Bann Reservoir	3 App. Cas. 430	107
Gellatly *v.* Arrol	1 M. 592	79
George *v.* Skivington	L. R. 5 Ex. 1	432
Gibraltar Sanitary Commissioners *v.* Orfila	15 App. Cas. 400	106
Gill *v.* Dickinson	5 Q. B. D. 159	307
Glossop *v.* Heston and Isleworth Local Board	12 Ch. D. 102	106
Godfray *v.* Godfray	3 Moo. P. C. (N.S.) 316	171
Goerz & Co. *v.* Bell	[1904] 2 K. B. 136	456
Govan Combination Parish Council *v.* Greenock Parish Council	7 F. 884	347
Grainger *v.* Gough	[1896] A. C. 325	457
Greenwood *v.* Leather Shod Wheel Company	[1900] 1 Ch. 421	34
Greig *v.* Ross	4 R. 465	349
Gresham Life Assurance Society *v.* Styles	[1892] A. C. 309	449
Griffiths *v.* Dudley (Earl)	9 Q. B. D. 357	195
Grissell, In re	12 Ch. D. 484	157
Gwynne *v.* Heaton	1 Bro. C. C. 9	470

H.

Halifax Union *v.* Wheelwright	L. R. 10 Ex. 183	562
Hall *v.* Conder	2 C. B. (N.S.) 22	517
Hambro *v.* Burnand	[1904] 2 K. B. 10	441
Hamilton *v.* Attorney-General	5 L. R. Ir. 555; 9 L. R. Ir. 271	94
——— *v.* Baker	14 App. Cas. 209	300
——— *v.* Bayne	1 Guthrie's Sh. Ct. Cases, 405	54
Hammersmith Railway Company *v.* Brand	L. R. 4 H. L. 171	250
Hargroves, Aronson & Co. *v.* Hartopp	[1905] 1 K. B. 472	433
Harmonides, The	[1903] P. 1	490
Harvey *v.* Forrest	4 D. 97; 4 Bell's App. 197	54
Hay *v.* Cumming	13 D. 1057	348
—— *v.* Ferguson	14 D. 352	349
—— *v.* Perth (Magistrates of)	4 Macq. 535	481
Healey *v.* Thorne	Ir. R. 4 C. L. 495	94
Herron *v.* Rathmines and Rathgar Improvement Commissioners	[1892] A. C. 498	111
Hewlett *v.* Allen	[1892] 2 Q. B. 662; [1894] A. C. 383	137
Hext *v.* Gill	L. R. 7 Ch. 699	324
Hill *v.* Campbell	L. R. 10 C. P. 222	435
—— *v.* Pannifer	[1904] 1 K. B. 811	286
Hodge *v.* Reg.	9 App. Cas. 117	543
Hogg *v.* Skeen	18 C. B. (N.S.) 427	562
Horton *v.* McMurtry	29 L. J. (Ex.) 260; 5 H. & N. 667	123

		PAGE
Hough *v.* Windus	12 Q. B. D. 224	292
Houlder Line, Ld. *v.* Griffin	[1905] A. C. 220	327
Houldsworth *v.* City of Glasgow Bank	5 App. Cas. 317	440
Hunter and Aikenhead *v.* Aitken	7 R. 510	481
Hursee Mahapatro *v.* Dinobundo Patro	I. L. R. 7 Calc. 523	218

I.

Imperial Gas Light and Coke Company *v.* Broadbent	7 H. L. C. 600	116
Indermaur *v.* Dames	L. R. 1 C. P. 274; 2 C. P. 311	432

J.

Jack *v.* Thom	23 D. 173	348
Jackson *v.* Winslow	2 Johnson, S. C. Rep. 83 (N. Y.)	572
Jephson *v.* Riera	3 Knapp, 130	546
Jewsbury *v.* Newbold	26 L. J. (Ex.) 247	158
John *v.* Albion Coal Company	18 Times L. R. 27	410
Johnson *v.* Crédit Lyonnais Company	3 C. P. D. 32	562
——— *v.* Shrewsbury and Birmingham Railway Company	3 D. M. & G. 914	256
Jones *v.* Jones	22 Q. B. D. 425	435
——— *v.* Williams	2 M. & W. 326	94

K.

Keighley, Maxsted & Co. *v.* Durant	[1901] A. C. 240	158, 327
King *v.* Forty-nine Casks of Brandy	2 Hagg. Adm. Rep. 257	94
Kirby *v.* Hunslet Assessment Committee	[1906] A. C. 43	301
Kirkintilloch Parish Council *v.* Eastwood Parish Council	5 F. 274	344
Knights *v.* Wiffen	L. R. 5 Q. B. 660	441

L.

Labouchere *v.* Wharncliffe (Earl)	13 Ch. D. 346	537
La Bourgogne	[1899] A. C. 431	456
La Cloche *v.* La Cloche	L. R. 3 P. C. 125	171
Ladkuvarbai *v.* Ghoel Shri Sarsanji Pratabsangji	7 Bomb. H. C. O. C. J. 150	218
Lamb *v.* Great Northern Railway Company	[1891] 2 Q. B. 281	137
Lancashire and Yorkshire Railway Company *v.* Bury Corporation	14 App. Cas. 417	572
Landsdown, Ex parte	7 N. S. W. L. R. 434	380
Lane *v.* Cox	[1897] 1 Q. B. 415	432
Langridge *v.* Levy	2 M. & W. 519	432
Lassence *v.* Tierney	1 Mac. & G. 551	505
Last *v.* London Assurance Corporation	10 App. Cas. 438	11
Law *v.* Redditch Local Board	[1892] 1 Q. B. 127	371
Lawson *v.* Gunn	4 R. 151	348
Leck *v.* Chalmers	21 D. 408	79
Leconfield (Lord) *v.* Lonsdale (Lord)	L. R. 5 C. P. 657	481
Le Feuvre *v.* Lankaster	23 L. J. (Q.B.) 254; 3 E. & B. 530	380
Lennox, In re	16 Q. B. D. 315	490
Levene *v.* Greenwood	20 Times L. R. 389	463

		PAGE
Lewis *v.* Great Western Railway Company	3 Q. B. D. 195	413
Lilley *v.* Elwin	17 L. J. (Q.B.) 132	123
Limpus *v.* London General Omnibus Company	1 H. & C. 526	441
Lomax *v.* Arding	10 Ex. 734	124
London and Brighton Railway Company *v.* Trumen	11 App. Cas. 45	107
London and South-Western Bank *v.* Wentworth	5 Ex. D. 96	562
London Bank of Mexico *v.* Apthorpe	[1891] 2 Q. B. 378	457
London, Chatham, and Dover Railway Company *v.* South Eastern Railway Company	[1892] 1 Ch. 120; [1893] A. C. 429	118
London County Council *v.* Attorney-General	[1901] A. C. 26	449
Lord *v.* Sydney Commissioners	12 Moo. P. C. 473	94
Lord Advocate *v.* Blantyre (Lord)	4 App. Cas. 770	94
——— *v.* Wemyss	[1900] A. C. 48	94
——— *v.* Young	12 App. Cas. 544	94
Love *v.* Bell	9 App. Cas. 286	307
Lows *v.* Telford	1 App. Cas. 414	573
Lyon and Gray *v.* Bakers of Glasgow	Mor. Dict. 12789	78

M.

Maccallum *v.* Turton	2 Y. & J. 183	435
McConnel *v.* Wright	[1903] 1 Ch. 546	31
McCullough *v.* Clemow	26 O. L. R. 467	118
——— *v.* Newlove	27 O. L. R. 627	118
McHenry *v.* Davies	L. R. 10 Eq. 88	157
Mackay *v.* Commercial Bank of New Brunswick	L. R. 5 P. C. 394	440
McMillan *v.* Campbell	10 S. 220	54
Magdalen College Case	6 Rep. 125	572
Maharajah Madhava Singh *v.* Secretary of State for India in Council	L. R. 31 Ind. App. 239	223
Mahony *v.* East Holyford Mining Company	L. R. 7 H. L. 869	441
Mair *v.* Himalaya Tea Company	L. R. 1 Eq. 411	256
Marcussen *v.* Birkbeck Bank	5 Times L. R. 179, 463	562
Martin *v.* Treacher	16 Q. B. D. 507	435
Maynard *v.* Moseley	3 Sw. 655	468
Mellor *v.* Walmesley	[1904] 2 Ch. 525	96
Menzies *v.* Macdonald	16 D. 827; 2 Macq. 463	480
——— *v.* Wentworth	3 F. 941	480
Merchants of the Staple of England (Mayor of) *v.* Bank of England	21 Q. B. D. 160	562
Mersey Docks and Harbour Board *v.* Lucas	8 App. Cas. 891	11, 449
Mersey Steel and Iron Company *v.* Naylor, Benzon & Co.	9 Q. B. D. 648; 9 App. Cas. 434	517
Metropolitan Asylum District *v.* Hill	6 App. Cas. 193	107
Metropolitan Railway Company *v.* Wright	11 App. Cas. 152	124
Mexborough (Earl) *v.* Whitwood District Council	[1897] 2 Q. B. 111	435
Michie *v.* Reynolds	24 U. C. R. 303	120

		PAGE
Middlemiss *v.* Berwickshire County Council	2 F. 392	326
Middleton *v.* Brown	47 L. J. (Ch.) 411	463
Millar *v.* Toulmin	17 Q. B. D. 603; 12 App. Cas. 746	123, 157, 161
Miller *v.* Hancock	[1893] 2 Q. B. 177	433
—— *v.* Powell	2 R. 976	490
Miner *v.* Gilmour	12 Moo. P. C. 131	79
Mitchell *v.* Simpson	25 Q. B. D. 183	251
——— *v.* Thomas	6 Moo. P. C. 137	171
Mogul Steamship Company's Case	[1892] A. C. 25	400
Montreal City *v.* Land and Loan Company	Quebec L. R. 13 K. B. 74	243
Montréal (La Cité de) *v.* Les Ecclésiastiques du Séminaire de St. Sulpice de Montréal	14 App. Cas. 660	550
Moorhouse *v.* Lord	10 H. L. C. 272	66
Morel *v.* Westmorland (Earl of)	[1904] A. C. 11	157
Morgan *v.* Bain	L. R. 10 C. P. 15	517
——— *v.* Crawshay	L. R. 5 H. L. 304	572
——— *v.* Savin	16 L. T. 333, 457	123
Morrow *v.* Whitney	95 U. S. Rep. 551	572
Moyse *v.* Cocksedge	Willes, 636; Barnes, 459	287
Muhammad Yusuf-ud-din *v.* Queen-Empress	L. R. 24 Ind. App. 137	228
Murray *v.* Duff	33 N. B. Rep. 351	570
Musgrove *v.* Chun Teeong Toy	[1891] A. C. 272	547
Mylam *v.* Market Harborough Advertiser Company	[1905] 1 K. B. 708	89

N.

Nash *v.* Calthorpe	[1905] 2 Ch. 237	31
—— *v.* De Freville	[1900] 2 Q. B. 72	562
Nelson *v.* Liverpool Brewery Company	2 C. P. D. 311	432
Nevill *v.* Snelling	15 Ch. D. 679	462
New Sharlston Collieries Company *v.* Westmorland (Earl)	[1904] 2 Ch. 443 n.	307
New Zealand Commissioners *v.* Nash.	3 N. Z. L. R. 139	123
Newby *v.* Van Oppen and Colt's Patent Firearms Manufacturing Company.	L. R. 7 Q. B. 293	456
Nixon *v.* Rowand.	15 R. 191	349
North Eastern Railway Company *v.* Hastings (Lord)	[1900] A. C. 260	94
North Shore Railway Company *v.* Pion	14 App. Cas. 612	111, 206
North-West Company *v.* Beatty	12 App. Cas. 589	495
Northumberland's (Duke of) Case	Leon. 21	572
Nutton *v.* Wilson	22 Q. B. D. 744	380

O.

Oaksmith's Lessee *v.* Johnston	92 U. S. Rep. 343	572
Ogden *v.* Fossick	4 D. F. & J. 426	256
Ohio and Mississippi Railroad Company *v.* Wheeler	1 Black (U.S.), 286	456
Ontario Mining Company *v.* Seybold	[1903] A. C. 73	206
Orme *v.* Crockford	13 Price, 376	435
Orr-Ewing *v.* Colquhoun Trustees	2 App. Cas. 839	481

P.

		PAGE
Palliser *v.* Gurney	19 Q. B. D. 519	156
Parkdale Corporation *v.* West	12 App. Cas. 602	111
Parker *v.* Baldwin	11 East, 488	573
Parmeter *v.* Gibbs	10 Price, 412	96
Part *v.* Bond	21 Times L. R. 553	463
Paxton *v.* Douglas	19 Ves. 225	435
Payne *v.* Rogers	2 H. Bl. 350	433
Peach & Co. *v.* Jewish Congregation of Johannesberg	1 Off. Rep. S. A. Republic, 345	371
Pearce *v.* Foster	17 Q. B. D. 536	123
People (The) *v.* New York (Mayor of)	28 Barbour, 253	572
Philpotts *v.* Philpotts	10 C. B. 85	427
Pillar *v.* Llynvi Coal and Iron Company	L. R. 4 C. P. 752	137
Poncione *v.* Higgins	21 Times L. R. 11	463
Porteous *v.* Blair	19 D. 181	348
Powell *v.* Brown	[1899] 1 Q. B. 157	327
——— *v.* Hepburn	Tasmanian Supreme Court, 1889, unreported	95
Prince *v.* Gagnon	8 App. Cas. 103	549

Q.

Queen-Empress *v.* Abdul Latif	I. L. R. 10 Bomb. 186	222
Quinn *v.* Leathem	[1901] A. C. 495	400

R.

Rameshur Pershad Narain Singh *v.* Koonj Behari Pattuk	4 App. Cas. 121	112
Ramsden *v.* Brearley	33 L. T. 322	435
Read *v.* Anderson	13 Q. B. D. 779	261
Redfern *v.* Redfern	[1891] P. 139	435
Redgrave *v.* Kelly	37 W. R. 543; 54 J. P. 70	138
Reeks *v.* Kynoch	18 Times L. R. 34	416
Rees *v.* Powell Duffryn Steam Coal Company	64 J. P. 164	410
Reg. *v.* Brierly	14 Ont. Rep. 525	543
—— *v.* Burah	3 App. Cas. 889; L. R. 5 Ind. App. 178	220
—— *v.* Greiner	30 Sup. Ct. Can. 42	187
—— *v.* Guest	7 Ad. & E. 951.	50
—— *v.* Southampton Dock Company	14 Q. B. 587	50
—— *v.* White	20 N. S. W. L. R. 12	251
Reid's Brewery Company *v.* Male	[1891] 2 Q. B. 1	449
Rex *v.* Birmingham and Staffordshire Gas Light Company	6 Ad. & E. 634	50
Reynolds, Ex parte	20 Ch. D. 294	435
Rhymney Iron Company *v.* Fowler	[1896] 2 Q. B. 79	450
Riel *v.* Reg.	10 App. Cas. 675	543
River Wear Commissioners *v.* Adamson	2 App. Cas. 763	426
Robbins *v.* Jones	15 C. B. (N.S.) 221	430
Roberts *v.* Haines	6 E. & B. 643; 7 E. & B. 625.	315
Robertson *v.* Foote & Co.	6 R. 1290	481
Robinson *v.* Canadian Pacific Railway Company	[1892] A. C. 481	187
Rogers *v.* Cardiff Corporation	[1905] 2 K. B. 832	326

		PAGE
Routh *v.* Thompson	13 East, 274	337
Rowbotham *v.* Wilson	8 H. L. C. 348	318
Royal Insurance Company *v.* Watson	[1897] A. C. 1	450
Rumboll *v.* Nunnery Colliery Company	80 L. T. 42	416
Runciman *v.* Mordington (Heritors of)	Mor. Dict. 10583	347
Russell *v.* Austwick	1 Sim. 52	496
——— *v.* Russell	14 Ch. D. 471	539
——— *v.* Town and County Bank	13 App. Cas. 418	449
Rutherglen Parish Council *v.* Glasgow Parish Council	[1902] A. C. 360	348

S.

Saccharin Corporation *v.* Reitmeyer & Co.	[1900] 2 Ch. 659	419
San Paulo Brazilian Railway Company *v.* Carter	[1896] A. C. 31	457, 530
Sandys *v.* Florence	47 L. J. (C.P.) 598	449
Saunders *v.* Newbold	[1905] 1 Ch. 260	461
Scholfield *v.* Londesborough (Earl)	[1896] A. C. 514	559
Scott *v.* Henderson	2 Thomp. N. S. Rep. 115	573
—— *v.* Morley	20 Q. B. D. 120	156
Seath & Co. *v.* Moore	11 App. Cas. 350	424
Secretary of State in Council *v.* Kamachee Boye Sahaba	7 Moo. Ind. App. 476	226
Shaw *v.* Port Philip Gold Mining Company	13 Q. B. D. 103	439
Sheffield Corporation *v.* Barclay	[1905] A. C. 392	446
Shelfer *v.* City of London Electric Lighting Company	[1895] 1 Ch. 287	112
Shepheard *v.* Broome	[1904] A. C. 342	29
Sinclair *v.* Preston	31 Can. Sup. Ct. 408	118
Sion College *v.* London Corporation	[1901] 1 K. B. 617	266
Smart *v.* Niagara and Detroit Rivers Railway Company	12 C. P. 404	120
——— *v.* Sandars	5 C. B. 895	255
Smith *v.* Chadwick	9 App. Cas. 195	31
——— *v.* Darby	L. R. 7 Q. B. 716	307
——— *v.* Hancock	[1894] 2 Ch. 377	275
——— *v.* McArthur	[1904] A. C. 389	243
——— *v.* McDonald	1 Oldwright, 274	373
——— *v.* Morrow	14 N. B. (1 Pugs.) 200	570
——— *v.* South Normanton Colliery Company	[1903] 1 K. B. 204	416
——— *v.* Stair (Earl)	6 Bell's A. C. 487	96
——— *v.* Stewart	11 R. 921	79
——— *v.* Walton	3 C. P. D. 109	137
Société Générale *v.* Metropolitan Bank	27 L. T. 849	568
Somerville *v.* Somerville	5 Ves. 749	65
Southwark and Vauxhall Water Company *v.* Wandsworth Board of Works	[1898] 2 Ch. 603	106
Sparks *v.* Pierce	115 U. S. Rep. 408	572
Spokes *v.* Grosvenor Hotel Company	[1897] 2 Q. B. 124	434
Spooner *v.* Sandilands	1 Y. & C. Ch. 390	255
Starkey *v.* Bank of England	[1903] A. C. 114	441
Steel *v.* Steel	15 R. 896	66
Steele *v.* Gourley	3 Times L. R. 118	88
Steer, In re	28 L. J. (Ex.) 22	65

		PAGE
Stevenson *v.* Reg.	2 Wyatt, Webb, and A'Beckett, Cases of Law, 143, 176	362
Stocker *v.* Brockelbank	20 L. J. (Ch.) 401	256
Stogdon *v.* Lee	[1891] 1 Q. B. 661	156
Sullivan *v.* Mitcalfe	5 C. P. D. 455	30
Surat (Nawab of)	9 Moo. P. C. 88	221
Surman *v.* Darley	14 M. & W. 181; 14 L. J. (M.C.) 145	299, 300
Sutherland (Duke) *v.* Ross	4 R. 765; 3 App. Cas. 736	481
Swan, Ex parte	30 L. J. (C.P.) 113; 7 C. B. (N.S.) 400	562
—— *v.* North British Australasian Company	2 H. & C. 175	562
Sydney Municipal Council *v.* Bourke	[1895] A. C. 433	106

T.

Taylor *v.* Barclay	2 Sim. 213	221
—— *v.* Horde	1 Burr. 109	572
Thomson *v.* Gibson	13 D. 683	348
Thorne *v.* Heard	[1894] 1 Ch. 599; [1895] A. C. 495	441
Toronto Corporation *v.* Bell Telephone Company of Canada	[1905] A. C. 52	206
Toronto Street Railway Company *v.* Toronto Corporation	[1893] A. C. 511	118
Triccam Panachand *v.* Bombay Railway Company	I. L. R. 9 Bomb. 244	222
Turner *v.* Goldsmith	[1891] 1 Q. B. 544	261
Tuthill *v.* Rogers	1 J. & Lat. 36	95
Twycross *v.* Grant	2 C. P. D. 469	29
Tyne Boiler Works Company *v.* Long Benton Overseers	18 Q. B. D. 81	46

U.

Udny *v.* Udny	L. R. 1 H. L. Sc. 441	64
Union Credit Bank *v.* Mersey Dock	[1899] 2 Q. B. 205	560
Union Steamship Company of New Zealand *v.* Melbourne Harbour Trust Commissioners	9 App. Cas. 365	250

V.

Von Heyden *v.* Neustadt	14 Ch. D. 230	422

W.

Wadley *v.* Bayliss	5 Taunt. 752	94
Wakelin *v.* London and South-Western Railway Company	12 App. Cas. 41	410
Wallace *v.* Caldwell	22 R. 43	348
—— & Co., Ex parte	13 N. S. W. L. R. 1	362
Wallis *v.* Smith	21 Ch. D. 243	371
Ward *v.* Bartholomew	6 Pickering (Mass.), 408	572
Waterpark *v.* Fennell	7 H. L. C. 650	94
Watson *v.* Swann	11 C. B. (N.S.) 756	337

		PAGE
Webster *v.* Mackenzie	15 D. 399	348
Werle *v.* Colquhoun	20 Q. B. D. 753	529
West *v.* Aberdeen Harbour Commissioners	4 R. 207	481
—— *v.* Berney	1 Russ. & My. 431	505
Western Counties Railway Company *v.* Windsor and Annapolis Railway Company	7 App. Cas. 178	111
Whitechurch *v.* Cavanagh	[1902] A. C. 117	441
Whitehead *v.* Reader	[1901] 2 K. B. 48	410
Williams *v.* Bagnall	15 W. R. 272	321
Willion *v.* Berkley	Plowd. 248	571
Willis *v.* Thorp	L. R. 10 Q. B. 383	137
Wilson *v.* Love	[1896] 1 Q. B. 626	371
Wilton *v.* Osborn	[1901] 2 K. B. 110	461
Winans *v.* Attorney-General	[1904] A. C. 287	64
Wingate & Co. *v.* Webber	3 Tax Cases, 569; 34 S. L. R. 699	456
Wingrove *v.* Wingrove	11 P. D. 81	184
Withers *v.* Reynolds	2 B. & Ad. 882	517
Wood *v.* Wood	L. R. 9 Ex. 190	539
Wright *v.* Hitchcock	L. R. 5 Ex. 37.	422
Wrigley *v.* Whittaker & Sons	[1902] A. C. 299	327
Wyngate *v.* Maske	Cro. Eliz. 275	572

Y.

Yarmouth Corporation *v.* Simmons	10 Ch. D. 518	207
Yorkshire Miners' Association *v.* Howden	[1905 A. C. 256	388
Young *v.* Grote	4 Bing. 253	561

THE

INCORPORATED COUNCIL OF LAW REPORTING

FOR

ENGLAND AND WALES.

Members of the Council.

Chairman—C. M. Warmington, Esq., K.C.
Vice-Chairman—F. A. Bosanquet, Esq., K.C.

EX-OFFICIO MEMBERS.

Sir John Lawson Walton, M.P. . . Attorney-General.
Sir William S. Robson, M.P. . . Solicitor-General.
Charles Mylne Barker, Esq., President of the Law Society.

ELECTED MEMBERS.

P. Ogden Lawrence, Esq., K.C. A. R. Kirby, Esq.	Lincoln's Inn.
F. A. Bosanquet, Esq., K.C. W. Pickford, Esq., K.C.	Inner Temple.
C. M. Warmington, Esq., K.C. C. C. Scott, Esq.	Middle Temple.
James Mulligan, Esq., K.C. J. C. Lewis Coward, Esq., K.C.	Gray's Inn.
W. English Harrison, Esq., K.C., of the Middle Temple. Robert F. Norton, Esq., K.C., of Lincoln's Inn.	Appointed by the Council of Law Reporting on the nomination of the General Council of the Bar.
Sir John Hollams, Knt. (Firm—Messrs. Hollams, Sons, Coward & Hawksley). E. J. Bristow, Esq. (Firm—Messrs. Wilson, Bristows & Carpmael).	The Law Society.

Secretary—P. Noble Fawcett, Esq., 10, Old Square, Lincoln's Inn, London, W.C.

The Mode of Citation of the Volumes of the *Law Reports*, commencing January 1, 1906, will be as follows:—

In the First Series,
[1906] 1 Ch. [1906] 2 Ch.

In the Second Series,
[1906] 1 K. B. [1906] 2 K. B. [1906] P.

In the Third Series,
[1906] A. C.

The year of the decision is now added to the references to cases cited in the *Law Reports* (the current series of the *Law Reports* from 1891 excepted). For example:

East India Co. v. *Tritton* (1824) 3 B. & C. 280.

Where a case is referred to more than once in the course of the same report the date is added to the first reference only.

INDEX.

Appeal Cases.

PAGE

APPEAL—Admitted by the Supreme Court dismissed as incompetent—Special leave to appeal refused: *See* PRIVY COUNCIL APPEALS. 4 132

ARBITRATION—Trespass, Action for—Injunction—Arbitration clause—Failure of company to proceed under their Act—Law of Canada: *See* PRIVY COUNCIL APPEALS. 3 110

"BUILDING"—Screen to prevent acquisition of right to light—Open space: *See* BURIAL 1

BURIAL—*Burial Ground—Open Space—Screen to prevent Acquisition of Right to Light—"Building"—Metropolitan Open Spaces Acts*, 1877 (40 & 41 *Vict. c.* 35), *s.* 1, *and* 1881 (44 & 45 *Vict. c.* 34), *ss.* 4, 5—*Disused Burial Grounds Act*, 1884 (47 & 48 *Vict. c.* 72), *s.* 3.

A disused churchyard was held and administered by a borough council as an open space under the Metropolitan Open Spaces Acts, 1877 and 1881, and the Disused Burial Grounds Act, 1884. An adjoining landowner built on his land houses which overlooked the churchyard. To prevent these houses from acquiring any right of light, and to administer the ground with a view to

PAGE

its enjoyment by the public as an open space the council proposed to erect a screen in the churchyard :—

Held, that a screen erected for such a purpose would not be a "building" prohibited by the Acts, and that the council in erecting it would be rightly administering the Acts.

The decision of the Court of Appeal, sub nom. *Boyce* v. *Paddington Borough Council*, [1903] 2 Ch. 556, reversed, and the decision of Buckley J., [1903] 1 Ch. 109, restored.

PADDINGTON CORPORATION *v.* ATTORNEY-GENERAL H.L.(E.) 1

CANADA—Laws of: *See* under PRIVY COUNCIL APPEALS—CANADA.

CASES :—

Alianza Co. v. *Bell*, [1905] 1 K. B. 184.
Affirmed by H. L. (E.) .. .. [1905] A. C. 18

Attorney-General v. *Ashton Gas Co.*, [1904] 2 Ch. 621.
Affirmed by H. L. (E.) sub nom. ASHTON GAS CO. *v.* ATTORNEY-GENERAL .. .. [1906] A. C. 10

Baily v. *British Equitable Assurance Co.*, [1904] 1 Ch. 374.
Reversed by H. L. (E.) sub nom. BRITISH EQUITABLE ASSURANCE COMPANY *v.* BAILY .. .. [1906] A. C. 35

Boyce v. *Paddington Borough Council*, [1903] 2 Ch. 556.
Reversed by H. L. (E.) sub nom. PADDINGTON CORPORATION *v.* ATTORNEY-GENERAL .. .. [1906] A. C. 1

Brooks v. *Brooks' Trustees*, (1902) 4 F. 1014.
See HUNTLY (MARCHIONESS OF) *v.* GASKELL. H. L. (Sc.) [1906] A. C. 56

Curtis v. *Old Monkland Conservative Association*, (1904) 7 F. 119.
Reversed by H. L. (Sc.) .. .. [1906] A. C. 86

Elliott v. *Crutchley*, [1904] 1 K. B. 565.
Affirmed by H. L. (E.) .. .. [1906] A. C. 7

Sutherland v. *Thomson*, (1902) 4 F. 957.
Affirmed by H. L. (Sc.) .. .. [1906] A. C. 51

Tait v. *Macleay*, [1904] 2 Ch. 631.
Reversed by H. L. (E.) sub nom. MACLEAY *v.* TAIT [1906] A. C. 24

Underground Electric Railways Company of London, Ld. v. *Inland Revenue Commissioners*, [1905] 1 K. B. 174.
Affirmed by H. L. (E.) .. .. [1906] A. C. 21

J. & M. White v. *White (J.) & Sons*, (1905) 42 S. L. R. 330.
Reversed by H. L. (Sc.) .. .. [1906] A. C. 72

Watson v. *Charlesworth*, [1905] 1 K. B. 74.
Affirmed by H. L. (E.) sub nom. CHARLESWORTH *v.* WATSON [1906] A. C. 14

1. COMPANY—*Life Assurance Company—Mutual Assurance—Policy-holder participating in Profits—Alteration of Regulations—Power of Company to alter Rights of Policy-holder.*

The respondent became a policy-holder in the participating branch of an assurance company upon the terms that he would abide by the deed of settlement, by-laws, and regulations of the company. After distributing the profits arising from that branch among the participating policy-holders for many years without deduction for a reserve fund the company proposed to alter that practice by devoting part of the profits to a reserve fund, and to alter the by-laws accordingly. By the deed of settlement the company had power to make alterations in the by-laws. The policy-holder having brought an action for an injunction against

PAGE

the company on the ground that he had taken his policy upon the faith of a prospectus which stated the practice:—

Held, that there was no contract between the company and the policy-holder not to alter their practice in the distribution of profits, and that the action could not be maintained.

The decision of the Court of Appeal, *Baily* v. *British Equitable Assurance Co.*, [1904] 1 Ch. 374, reversed.

BRITISH EQUITABLE ASSURANCE COMPANY *v.* BAILY H. L. (E.) 35

2. COMPANY—*Prospectus — Non-disclosure of Contracts — Directors' Liability—Proof of Damage—Waiver Clause—Companies Act*, 1867 (30 & 31 *Vict. c.* 131), *s.* 38.

To recover damages under s. 38 of the Companies Act, 1867, a plaintiff who has subscribed for shares on the faith of a prospectus which did not disclose a material contract must prove that he has sustained damage, and that if he had known of the undisclosed contract he would not have become a shareholder.

Where there is no fraud in fact and the non-disclosure is owing to an honest mistake, a subscriber for shares who has agreed to waive any fuller compliance with s. 38 than is contained in the prospectus cannot maintain an action for damages.

The decision of the Court of Appeal, *Tait* v. *Macleay*, [1904] 2 Ch. 631, reversed on the above grounds.

MACLEAY *v.* TAIT .. .. H. L. (E.) 24

——— Income tax—Gas company—Standard rate of dividend: *See* REVENUE. 1 10

——— Income tax—Nitrate grounds situate abroad—Profits and gains—Deduction: *See* REVENUE. 2 18

CONSIDERATION—Payable on contingency — Stamp — Conveyance: *See* REVENUE. 4 21

CONTINGENCY—Consideration payable on—Stamp—Conveyance: *See* REVENUE. 4 21

CONTRACT—*Performance Impossible—Payment made "on Account of" Contract—Express Provision in the Event of no Expense being incurred—Refreshments.*

A caterer agreed to supply refreshments at a fixed price to the respondents on the occasion of a naval review to be held on a named day, "300*l.* to be paid to the caterer on account of the refreshments on the Monday previous to the review day," it being expressly stipulated that in the event of the cancellation of the review before any expense was incurred by the caterer there should be no liability on the respondents. A few days before the named day it was known that the review would not be held. The caterer had spent about 20*l.* in crockery, &c., but incurred no expense in providing refreshments. The caterer having sued the respondents upon a cheque for 300*l.* given by them to him in advance in accordance with the contract:—

Held, that upon the true construction of this particular contract the respondents were not liable in respect of refreshments, and could not be sued upon the cheque.

The decision of the Court of Appeal, [1904] 1 K. B. 565, affirmed.

ELLIOTT *v.* CRUTCHLEY .. .. H. L. (E.) 7

——— Prospectus — Non-disclosure of contracts — Directors' liability—Waiver clause: *See* COMPANY. 2 24

——— Railway—Contract, Construction of—"Whole operation of its railway"—Laws of Canada: *See* PRIVY COUNCIL APPEALS. 1 100

PAGE

CONVEYANCE—Stamp—Consideration payable on contingency: *See* REVENUE. 4 21

CORPORATION—Drain—Negligence—Liability of municipal authorities—Law of Victoria: *See* PRIVY COUNCIL APPEALS. 7 .. 105

COVENANT—Mining lease—Construction—Damages: *See* MINE .. 14

CROWN—Trespass—Title to foreshore under a Crown grant—Construction: *See* PRIVY COUNCIL APPEALS. 6 92

DAMAGE AND DAMAGES—Company—Prospectus—Non-disclosure of contracts—Directors' liability—Proof of damage—Waiver clause: *See* COMPANY. 2 24

———————— Mining lease—Construction—Covenant: *See* MINE 14

DIRECTOR—Prospectus—Non-disclosure of contracts—Directors' liability—Waiver clause: *See* COMPANY. 2 24

DISMISSAL—Action for wrongful dismissal—Duty of the trial judge—New trial ordered: *See* PRIVY COUNCIL APPEALS. 5 122

DISUSED BURIAL GROUNDS ACTS: *See* under BURIAL.

DIVIDEND—Income tax—Gas company—Standard rate of dividend: *See* REVENUE. 1 10

DOMICIL—*Acquisition of Domicil—Intention—Legitim—Scottish Law.* The abandonment or change of a domicil is a proceeding of a very serious nature, and an intention to make such an abandonment must be proved by satisfactory evidence.

A person having a domicil of origin in England does not lose it and acquire a Scottish domicil by making his home in Scotland for many years, unless in the circumstances his doing so clearly shews his intention to abandon his original domicil.

The testator, whose domicil of origin was in England, had his chief residence or home in Scotland for thirty years prior to his death. During this time he retained his interests in England as principal partner in a private bank at Manchester, and as proprietor of large landed estates, and continued his occupancy as tenant of a mansion house near Manchester and of a house in London. He left very large personal estate and a will in English form, made a short time before his death, in which he was designated as of Manchester. He also made a will in Scottish form. Apart from making his home in Scotland there was nothing in his conduct to suggest any intention of abandoning his English domicil:—

Held, affirming the decision of the First Division of the Court of Session, that he had not lost his English domicil.

MARCHIONESS OF HUNTLY *v.* GASKELL .. H. L. (Sc.) 56

DRAINS: *See* under SEWERS.

DUTY—Public revenue: *See* under REVENUE.

EVIDENCE—Foreshore, title to, under a Crown grant—Improper rejection of evidence—Acts of user before the grant admissible: *See* PRIVY COUNCIL APPEALS. 6 92

FACTORY—Poor rate—Rating of factory with machinery: *See* RATES 43

FINANCE ACTS: *See* under REVENUE.

FORESHORE—Trespass—Title to foreshore under a Crown grant—Construction: *See* PRIVY COUNCIL APPEALS. 6 92

PAGE

GAS—Income tax—Gas company—Standard rate of dividend: *See* REVENUE. 1 10

HERITAGE—Right in security—Messenger-at-arms: *See* SCOTTISH LAW 51

INCOME TAX: *See* under REVENUE.

INJUNCTION—Trespass, Action for—Arbitration clause—Failure of company to proceed under their Act—Law of Canada: *See* PRIVY COUNCIL APPEALS. 3 110

INSURANCE, LIFE—Policy-holder participating in profits—Power of company to alter rights of policy-holder: *See* COMPANY. 1 .. 35

INTEREST—On payments in arrear—Practice—Law of Ontario: *See* PRIVY COUNCIL APPEALS. 2 117

JUSTIFICATION—Plea of—Action for wrongful dismissal—Duty of the trial judge—New trial ordered: *See* PRIVY COUNCIL APPEALS. 5 122

LEASE—Mining lease—Construction—Covenant—Damages: *See* MINE 14

LEGITIM—Domicil, Acquisition of—Intention—Scottish law: *See* DOMICIL 56

LIFE INSURANCE: *See* under INSURANCE, LIFE.

LIGHT AND AIR—"Building"—Open space—Screen to prevent acquisition of right to light: *See* BURIAL 1

LONDON—"Building"—Burial ground—Screen to prevent acquisition of right to light: *See* BURIAL.. 1

MACHINERY—Poor rate—Rating of factory with machinery: *See* RATES 43

MESSENGER-AT-ARMS—Heritage—right in security: *See* SCOTTISH LAW 51

METROPOLIS: *See* under LONDON.

MILL OWNERS—Riparian proprietors, Rights of—Abstraction of the whole of the water from river—Ex adverso mill owners: *See* RIVER 72

MINE—*Mining Lease—Construction—Covenant to win, work and get fairly, duly and honestly the whole of the Coal—Damages.*

By a mining lease a seam of coal under land of the lessors was demised for a term of years at an annual rent, and until the working began at a nominal dead rent, and the lessees covenanted that they would at all times during the term fairly, duly and honestly win, work and get the whole of the seam in a proper and workmanlike manner. Owing to difficulties in working it was found to be impossible to work the coal without heavy pecuniary loss, and the lessees therefore abandoned the undertaking:—

Held, that upon the true construction of this particular lease the lessees had broken their covenant, and were liable in damages to the lessors.

The decision of the Court of Appeal, *Watson* v. *Charlesworth*, [1905] 1 K. B. 74, affirmed.

CHARLESWORTH *v.* WATSON .. .. .. H. L. (E.) 14

PAGE

NEGLIGENCE—Drain—Liability of municipal authorities—Law of Victoria: *See* PRIVY COUNCIL APPEALS. 7 105

NEWFOUNDLAND—Laws of: *See* PRIVY COUNCIL APPEALS. 4 .. 132

NEW ZEALAND—Laws of: *See* PRIVY COUNCIL APPEALS. 5 .. 122

NITRATE GROUNDS—Situate abroad—Income tax—Deduction: *See* REVENUE. 2 18

ONTARIO—Laws of: *See* under PRIVY COUNCIL APPEALS—CANADA—ONTARIO.

OPEN SPACE—Screen to prevent acquisition of right to light—"Building": *See* BURIAL 1

PAYMENTS—Interest on payments in arrear—Law of Ontario: *See* PRIVY COUNCIL APPEALS. 2 117

POLICY—Life insurance: *See* under INSURANCE, LIFE.

POOR RATE: *See* under RATES.

PRACTICE—Appeal admitted by the Supreme Court dismissed as incompetent—Special leave to appeal refused: *See* PRIVY COUNCIL APPEALS. 4 132

——— Interest on payments in arrear—Law of Ontario: *See* PRIVY COUNCIL APPEALS. 2 117

——— New trial ordered—Action for wrongful dismissal—Duty of the trial judge: *See* PRIVY COUNCIL APPEALS. 5 122

1. PRIVY COUNCIL APPEALS—CANADA—*Contract, Construction of—"Whole Operation of its Railway"—Limits to Whole Operation—Civil Code of Lower Canada, art.* 1018.

By art. 1018 of the Civil Code of Lower Canada, "all the clauses of a contract are interpreted the one by the other, giving to each the meaning derived from the entire act."

The appellant company having contracted with the respondent city to pay annually certain specified percentages on the total amount of their gross earnings arising from the whole operation of their railway, and it appearing from the rest of the contract that the city considered territories of outside municipalities were not included within and that it could only deal with streets within its jurisdiction, and that the company had to make separate arrangements with outside municipalities in respect of the operation of the railway within their limits:—

Held, that by the true construction of the contract the city was only entitled to percentages on the gross earnings arising from the whole operation of the lines within its own limits.

MONTREAL STREET RAILWAY COMPANY *v.* CITY OF MONTREAL P. C. 100

2. ——————————CANADA—ONTARIO—*Interest on Payments in Arrear—Ontario Judicature Act (Revised Statutes of Ontario*, 1897, *c.* 51), *s.* 113—*Construction.*

Ontario Judicature Act (Revised Statutes of Ontario, 1897, c. 51), s. 113, enacts that "interest shall be payable in all cases in which it is now payable by law or in which it has been usual for a jury to allow it":—

Held, that under the true construction of this section it is incumbent upon the Court to allow interest for such time and at such rate as it may think right in all cases where a just payment

PAGE

has been improperly withheld, and compensation therefor seems fair and equitable.

An order by the Court below that the appellant company should pay arrears of track rentals within the limits of the respondent city, over and above their periodical payments already made, and should pay interest thereon, was affirmed.

TORONTO RAILWAY COMPANY *v.* TORONTO CORPORATION
P. C. 117

3. PRIVY COUNCIL APPEALS—CANADA—ONTARIO—*Trespass, Action for—Ontario Act* 36 *Vict. c.* 102, *s.* 5—*Injunction—Arbitration Clauses—Remedy by Action—Failure of Company to proceed under their Act.*

In an action for trespass on the appellant's land and interference with his water rights, the respondents pleaded that they were authorized thereunto by their incorporating Act (36 Vict. c. 102, Ontario), and that the appellant's remedy (if any) was to proceed by arbitration under the Act :—

Held, that according to the true construction of s. 5 the arbitration clauses only come into operation on disagreement as to the amount of purchase-money, value, or damages arising after definite notice of expropriation and treaty or tender relative thereto ; and that as the respondents had not proceeded in accordance with the directions of their Act, the appellant had not lost his remedy by action.

An injunction was rightly granted in this case, but its effect will cease on the respondents proceeding to expropriate in the manner directed by their Act.

SAUNBY *v.* WATER COMMISSIONERS OF THE CITY OF LONDON AND THE CORPORATION OF THE CITY OF LONDON (ONTARIO)
P. C. 110

4. ——————————— NEWFOUNDLAND — *Practice — Appeal admitted by the Supreme Court dismissed as Incompetent—Special Leave to Appeal refused.*

Where a final decree for money was made against the appellant on April 6, 1898, and a motion to set it aside was dismissed on June 7, 1899, and again on August 29, 1904, and the appellant's application to restrain execution was refused on March 20, 1905 :—

Held, on the respondent's petition, that an appeal from the order of March 20, 1905, must be dismissed. It was merely a repetition of the order of August 29, 1904, from which an appeal was barred :

Held also, on the appellant's petition that special leave to appeal from the orders of June, 1899, and August, 1904, must be refused, having regard to delay, and the impossibility of obtaining any relief without reversing the final judgment of April 6, 1898, to which no objection could be maintained.

GRIEVE *v.* TASKER .. .. P. C. 132

5. ——————————— NEW ZEALAND—*Action for Wrongful Dismissal—Plea of Justification—Verdict for Damages—Duty of the Trial Judge—New Trial ordered.*

There is no fixed rule of law defining the degree of misconduct which will justify dismissal from service.

It is a question for the jury whether the degree of misconduct was inconsistent with the fulfilment of the express or implied conditions of service, so as to justify dismissal.

The judge should not submit any issue to them if, in his opinion, no evidence of justification has been given. If he submits the issue he should direct, guide and assist them ; direct, by informing

PAGE

them of the nature of the acts which, as a matter of law, would justify dismissal; guide, by calling their attention to the material facts; assist, in a manner and to an extent which there is no reason to define.

In an action for wrongful dismissal where a plea of justification was substantially set up:—

Held, that the judge was right in submitting the issues of fact to the jury; that the verdict for the plaintiff was so unsatisfactory that it ought not to be maintained; that rule 5 in the Schedule to the Court of Appeal (New Zealand) Act, 1882 (similar to Order LVIII., r. 4, 1875), enabled judgment to be entered according to the evident justice of the case; but that under the circumstances a new trial should be directed.

CLOUSTON & Co. *v.* CORRY .. .. P. C. 122

6. PRIVY COUNCIL APPEALS—TASMANIA—*Seashore—Trespass, Action of—Title to Foreshore under a Crown Grant — Construction—Improper Rejection of Evidence—Acts of User before the Grant admissible—Grant of Lands already in Possession of Grantee.*

In an action against the respondents for a trespass by their agents on the foreshore, the appellants claimed that they were entitled thereto under a Crown grant in 1848 conveying to them the lands of which prior to the grant they had taken possession and on which they had expended money; and the judge directed the jury that evidence of acts of user antecedent to the grant was inadmissible:—

Held, that the appellants were entitled to a new trial. Acts of user before the grant led up to and explained what was afterwards granted, and were cogent evidence of what was intended to pass thereby.

Held, further, that a direction to the effect that a lease by the appellants of part of a jetty extending over the foreshore was only evidence of an easement, not of the lessor's title to the land over which the structure was erected, was also calculated to mislead. It ought to have been to the effect that it was clearly evidence of seisin in the locus in quo.

VAN DIEMEN'S LAND COMPANY *v.* MARINE BOARD OF TABLE CAPE .. .. P. C. 92

7. ——————————— VICTORIA — *Drain, Construction of—Negligence — Liability of Municipal Authorities — Exercise of Statutory Powers.*

Where municipal authorities under their statutory powers took over the care of a watercourse and made it into a public drain, which proved in course of time to be increasingly insufficient to hold and pass on the mixture of slime and sewage poured into it, with the result that the plaintiff's property was flooded thereby:—

Held, that they were liable for negligence, notwithstanding that the drain when first formed was sufficient for its purpose.

HAWTHORN CORPORATION *v.* KANNULUIK .. .. P. C. 105

PROSPECTUS—Non-disclosure of contracts—Directors' liability—Proof of damage—Waiver clause: *See* COMPANY. 2 24

RAILWAY—Contract—"Whole operation of its railway"—Laws of Canada: *See* PRIVY COUNCIL APPEALS. 1 100

RATES—*Poor Rate—Rating of Factory with Machinery — Machines used in connection with Hereditament, but remaining the Personal Property of the Tenant.*

Tenants' machinery placed in a factory, and used therewith for

PAGE

the business of the factory, whether it be affixed to the freehold or not, may be taken into consideration so as to increase the amount in assessing the factory to the poor rate. The law and practice to this effect have been too long established to be now overruled.

KIRBY *v.* HUNSLET UNION ASSESSMENT COMMITTEE H. L. (E.) 43

REFRESHMENTS—Contract—Performance impossible : *See* CONTRACT 7

1. REVENUE—*Income Tax—Gas Company—Standard Rate of Dividend—Payment of Dividend free of Income Tax—Income Tax Act*, 1842 (*5 & 6 Vict. c.* 35), *ss.* 40, 54, 60, *Sched. A., No. III., r.* 3.

By the special Act of a gas company it was provided that the profits to be divided among the shareholders in any year should not exceed a given rate :—

Held, that in arriving at the rate of dividend the profits ought to be calculated as inclusive and not exclusive of the amount payable for the year in respect of income tax.

The decision of the Court of Appeal, *Attorney-General* v. *Ashton Gas Co.*, [1904] 2 Ch. 261, affirmed.

ASHTON GAS COMPANY *v.* ATTORNEY-GENERAL H. L. (E.) 10

2. ——— *Income Tax—Nitrate Grounds situate Abroad—Profits and Gains—Deduction to meet Exhaustion of Material—Deduction on account of Diminution of Capital—Income Tax Act*, 1842 (*5 & 6 Vict. c.* 35), *s.* 100, *Sched. D.; First Case, r.* 3; *s.* 159.

An English company owned land abroad which they had bought for a large sum, and where they carried on a manufacture of nitrates and iodine by working up certain deposits found on the land. In estimating their yearly profits and gains from the sale of the nitrates and iodine for assessment to the income tax under Sched. D. :—

Held, that the company were not entitled to make any deduction in respect of the exhaustion of the deposits.

The decision of the Court of Appeal, [1905] 1 K. B. 184, affirmed.

ALIANZA COMPANY *v.* BELL .. .. .. H. L. (E.) 18

3. ——— *Income Tax—Unincorporated Association—Exemption—Income not exceeding* 160*l.—Income Tax Act*, 1842 (*5 & 6 Vict. c.* 35), *ss.* 40, 163, 168, 192—*Finance Act*, 1894 (*57 & 58 Vict. c.* 30), *s.* 34.

An unincorporated association is not exempt from liability to the payment of income tax by reason of its income not exceeding 160*l.* a year.

Decision of the First Division of the Court of Session (as the Court of Exchequer), Scotland, (1904) 7 F. 119, reversed.

CURTIS *v.* OLD MONKLAND CONSERVATIVE ASSOCIATION H. L. (Sc.) 86

4. ——— *Stamp—Conveyance—Ad Valorem Duty—Consideration—Consideration Payable on Contingency—Stamp Act*, 1891 (*54 & 55 Vict. c.* 39), *s.* 56, *sub-s.* 2, *s.* 57.

Part of the consideration for the sale of a company's assets to another company was that the buying company should pay out of its profits to the selling company an annual dividend of 3 per cent. upon capital issued, after paying to its own shareholders a 5 per cent. dividend upon its shares :—

Held, that the dividend of 3 per cent., though payable on a contingency or more than one contingency, was "money payable

PAGE

periodically" within the meaning of the Stamp Act, 1891, c. 39, s. 56, sub-s. 2.

The decision of the Court of Appeal, [1905] 1 K. B. 174, affirmed.

UNDERGROUND ELECTRIC RAILWAYS COMPANY, OF LONDON, LIMITED *v.* INLAND REVENUE COMMISSIONERS H. L. (E.) 21

RIPARIAN PROPRIETORS—Rights of—Abstraction of the whole of the water from river—Ex adverso mill owners: *See* RIVER 72

RIVER—*Rights of Riparian Proprietors—Abstraction of the Whole of the Water from River—Ex adverso Mill Owners.*

By the general law applicable to running streams every proprietor has a right to the ordinary use of the water flowing past his land, also rights may be acquired by prescription which interfere with the natural rights of other proprietors; but the ownership of an artificial dam, although it may give a right to maintain the dam, does not turn the running stream into a pond so as to give the owner of the dam an exclusive right to use the whole of the running water.

Decision of the Second Division of the Court of Session, Scotland, (1905) 42 S. L. R. 330, reversed.

JOHN WHITE & SONS *v.* J. & M. WHITE .. H. L. (Sc.) 72

SCOTTISH LAW—*Heritage—Right in Security — Messenger-at-Arms — Heritable Securities (Scotland) Act*, 1894 (57 & 58 *Vict. c.* 44), *ss.* 8, 10—*Scottish Law.*

By the Heritable Securities (Scotland) Act, 1894, s. 8, any creditor who has exposed for sale under his security the lands held in security . . . . may apply to the sheriff for decree in the terms of Sched. D. thereto annexed, and the sheriff may "after service on the proprietor and on the other creditors, if any, and after such intimation and inquiry as he may think fit, grant such application and issue decree in the said terms. On such decree being pronounced and an extract thereof in which said lands shall be described at length or by reference recorded in the appropriate register of sasine, the right of redemption reserved to the debtor shall be extinguished, and the creditor shall have right to the lands disponed in security in the same manner and to the same effect as if the disposition in security had been an irredeemable disposition as from the date of such decree." By s. 10 "no purchaser from the creditor or other successor in title in the lands shall be under any duty to inquire into the regularity of the proceedings under which such creditor has acquired right to the lands held under his security by virtue of the provisions contained herein, or be affected by any irregularity therein, without prejudice to any competent claim of damages against such creditor."

In 1895 certain creditors presented a petition under s. 8 of the above Act. The appellant, the proprietor of the lands, did not appear. The sheriff granted decree. Thereafter the creditors sold the lands and granted dispositions in favour of the purchasers.

In 1901 the original proprietor brought an action against the creditors and purchasers for reduction of the citation and execution of service upon him of the petition in the sheriff Court, alleging that the service had been executed by a messenger-at-arms, who was not an officer of the sheriff Court; and he pleaded that such service, with all that had followed thereon, including the disposition to the purchasers, was null and ineffectual:—

Held, affirming the decision of the Second Division of the Court of Session, (1902) 4 F. 957, that, assuming the service to be as stated, the error was an "irregularity in the proceedings" within

PAGE

the meaning of s. 10 of the Heritable Securities (Scotland) Act, 1894, and consequently that the right of the purchasers was not affected thereby.

SUTHERLAND *v.* THOMSON (MANAGER OF STANDARD LIFE ASSURANCE COMPANY) (Second Appeal) .. H. L. (Sc.) 51

SCOTTISH LAW—Domicil, Acquisition of—Intention—Legitim: *See* DOMICIL 56

——————— River—Riparian proprietors, Rights of—Abstraction of the whole of the water from river—Ex adverso mill owners: *See* RIVER 72

SCREEN—To prevent acquisition of right to light—"Building"—Open spaces: *See* BURIAL 1

SEASHORE—Trespass—Title to foreshore under a Crown grant—Construction: *See* PRIVY COUNCIL APPEALS. 6 92

SECURITY—Heritage—Right in security—Messenger-at-arms: *See* SCOTTISH LAW 51

SEWERS—Negligence—Liability of municipal authorities—Laws of Victoria: *See* PRIVY COUNCIL APPEALS. 7 105

STAMP—Conveyance—Ad valorem duty—Consideration payable on contingency: *See* REVENUE. 4 21

STATUTES:—

I. IMPERIAL STATUTES:

1842.

5 & 6 Vict. c. 35 (Income Tax), ss. 40, 54, 60, Sched. A. No. III., r. 3: *See* REVENUE. 1 10

——————————— ss. 40, 163, 168, 192: *See* REVENUE. 3 86

——————————— s. 100, Sched. D., First Case, r. 3; s. 159: *See* REVENUE. 2 18

1867.

30 & 31 Vict. c. 131 (Companies), s. 38: *See* COMPANY. 2 .. 24

1877.

40 & 41 Vict. c. 35 (Metropolitan Open Spaces), s. 1: *See* BURIAL 1

1881.

44 & 45 Vict. c. 34 (Metropolitan Open Spaces), ss. 4, 5: *See* BURIAL 1

1884.

47 & 48 Vict. c. 72 (Disused Burial Grounds), s. 3: *See* BURIAL.. 1

1891.

54 & 55 Vict. c. 39 (Stamps), s. 56, sub-s. 2; s. 57: *See* REVENUE. 4 21

1894.

57 & 58 Vict. c. 30 (Finance), s. 34: *See* REVENUE. 3 86

57 & 58 Vict. c. 44 (Heritable Securities—Scotland), ss. 8, 10: *See* SCOTTISH LAW 51

II. COLONIAL STATUTES:

Canada, Statutes of:

Civil Code of Lower Canada, art. 1018: *See* PRIVY COUNCIL APPEALS. 1 100

Ontario Act 36 Vict. c. 102, s. 5: *See* PRIVY COUNCIL APPEALS. 3 110

Ontario Judicature Act (Revised Statutes of Ontario, 1897, c. 51), s. 113: *See* PRIVY COUNCIL APPEALS. 2 117

PAGE

TASMANIA—Laws of: *See* PRIVY COUNCIL APPEALS. 6 92

TAXES: *See* under REVENUE.

TRESPASS—Action for—Injunction—Arbitration clause—Failure of company to proceed under their Act—Law of Canada: *See* PRIVY COUNCIL APPEALS. 3 110

———————Seashore—Title to foreshore under a Crown grant—Construction: *See* PRIVY COUNCIL APPEALS. 6 92

TRIAL—New trial ordered—Action for wrongful dismissal—Duty of the trial judge: *See* PRIVY COUNCIL APPEALS. 5 122

USER—Title to foreshore under a Crown grant—Improper rejection of evidence—Acts of user before the grant admissible: *See* PRIVY COUNCIL APPEALS. 6 92

VICTORIA—Laws of: *See* PRIVY COUNCIL APPEALS. 7 105

WAIVER—Prospectus—Non-disclosure of contracts—Directors' liability—Waiver clause: *See* COMPANY. 2 24

WATER—River—Rights of riparian proprietors: *See* RIVER 72

WORDS—"Building:" *See* BURIAL 1

LIST

OF THE

JUDICIAL COMMITTEE

OF

HIS MAJESTY'S MOST HONOURABLE

PRIVY COUNCIL,

ESTABLISHED BY THE 3RD & 4TH WILL. IV., C. 41,

FOR HEARING AND REPORTING ON APPEALS TO HIS MAJESTY IN COUNCIL.

1906.

Lord *Loreburn*, Lord Chancellor.
Earl of *Halsbury*.
Earl of *Crewe*, Lord President.

Ex-Lord Presidents:
- Duke of *Devonshire*,
- The Marquis of *Ripon*,
- Earl of *Cranbrook*,
- Earl *Spencer*,
- Earl of *Rosebery*,
- Marquis of *Londonderry*,

Lord *Ashbourne*.
Lord *Macnaghten*.
Lord *Field*.
Lord *Davey*.
Lord *James of Hereford*.
Lord *Brampton*.
Lord *Robertson*.
Lord *Lindley*.
Lord *Atkinson*.
Lord *Alverstone*.
Sir *Edward Fry*.
Sir *Samuel Way*, Bart.
Sir *Henry De Villiers*.
Sir *Henry Strong*.
Sir *Ford North*.
Sir *Samuel Griffith*.
Sir *Andrew Scoble*.
Sir *Arthur Wilson*.
Sir *John Bonser*.
Sir *Henri Elzear Taschereau*.

And others ex-officio under the Appellate Jurisdiction Acts of 1876 (39 *&* 40 *Vict. c.* 50) *and* 1887 (50 *&* 51 *Vict. c.* 70).

Appeal Cases

BEFORE

THE HOUSE OF LORDS

(ENGLISH—IRISH—AND SCOTTISH)

AND

THE JUDICIAL COMMITTEE

OF

HIS MAJESTY'S MOST HONOURABLE

PRIVY COUNCIL.

[HOUSE OF LORDS.]

MAYOR, &c., OF PADDINGTON AND ANOTHER . APPELLANTS ; AND ATTORNEY-GENERAL AND ANOTHER . . . RESPONDENTS.

H. L. (E.) 1905 *Nov.* 14.

Burial Ground—Open Space—Screen to prevent Acquisition of Right to Light—"Building"—Metropolitan Open Spaces Acts, 1877, *c.* 35, *s.* 1, and 1881, *c.* 34, *ss.* 4, 5—*Disused Burial Grounds Act*, 1884, *c.* 72, *s.* 3.

A disused churchyard was held and administered by a borough council as an open space under the Metropolitan Open Spaces Acts, 1877 and 1881, and the Disused Burial Grounds Act, 1884. An adjoining landowner built on his land houses which overlooked the churchyard. To prevent these houses from acquiring any right of light, and to administer the ground with a view to its enjoyment by the public as an open space, the council proposed to erect a screen in the churchyard:—

Held, that a screen erected for such a purpose would not be a "building" prohibited by the Acts, and that the council in erecting it would be rightly administering the Acts.

The decision of the Court of Appeal, [1903] 2 Ch. 556, reversed, and the decision of Buckley J., [1903] 1 Ch. 109, restored.

THE churchyard of St. Mary's, Paddington, was an "open space" and a "disused burial ground" within the meaning of

H. L. (E.) 1905

PADDINGTON CORPORATION. v. ATTORNEY-GENERAL.

the Metropolitan Open Spaces Acts, 1877 and 1881, and the Disused Burial Grounds Act, 1884. The Paddington Vestry (whose successors were the Paddington Borough Council) were authorized, by faculties from the bishop, to exercise the powers of management granted by the above Act of 1881. The respondent Boyce having built large blocks of flats with windows overlooking the churchyard, the council (after negotiations and differences) passed a resolution empowering their surveyor to erect a screen in the churchyard in front of the flats facing the churchyard. The respondent Boyce (with the Attorney-General afterwards added) brought an action against the appellants (under the name of the Paddington Borough Council) and the vicar of Paddington, claiming an injunction. Buckley J. dismissed the action, and this decision was reversed by the Court of Appeal (Vaughan Williams, Romer, and Cozens-Hardy L.JJ.), who made an order (inter alia) that the appellants be perpetually restrained from holding, administering or using the churchyard for any purpose other than the purposes pointed out by the Metropolitan Open Spaces Acts, 1877, 1881 and 1887, and the Disused Burial Grounds Act, 1884, and in particular from using the churchyard for the purpose of erecting thereon any building or screen to prevent the access of light coming over the churchyard to the windows of the flats; the respondent Boyce undertaking that he would not claim at any time to have obtained a statutory right under the Prescription Act to the access of light to his windows by reason of the non-erection. Hence the present appeal.

Haldane, K.C., and *H. Terrell, K.C.* (*T. A. Nash* with them), for the appellants. The borough council are entitled and bound under the Metropolitan Open Spaces Act, 1881, c. 34, s. 5, to hold and administer this churchyard with a view to its enjoyment by the public, and "for no other purpose." This enjoyment will undoubtedly be diminished by lofty buildings with windows overlooking the open space, and interfering with the light, air, and sunshine, and gaining by prescription rights to light and air. The screen proposed is not a "building" within the meaning of the Act.

Astbury, K.C., and *Mark Romer*, for the respondents. The erection of a screen is contrary to s. 5 of the Act of 1881, which imposes a condition that the open space shall be held "free from buildings, and under proper control and for no other purpose," and with the Disused Burial Grounds Act, 1884, c. 72, s. 3, which expressly forbids buildings.

[They referred to the cases cited in the Court below.]

Haldane, K.C., in reply.

EARL OF HALSBURY L.C. My Lords, I confess I should have been better satisfied if the parties had thought it right to come to some agreement in this case, but, of course, they have a right to have the judgment of the Court; and while on the one hand certainly there are public rights involved, on the other the question, as it arises here, is a question between a private speculator who wants to make the best of his building and a public body whose only interest is to preserve that which is committed to their charge in as unincumbered a condition as they received it.

In the first place, I think it is necessary to consider what is the meaning of the prohibition contained in either of the Acts referred to. I am of opinion that it meant what it said—that the space was to remain unbuilt upon. It is to be disused as a burial ground, but it is not to be used as building ground—that is the meaning of it; and it appears to me that anything that approaches to the character of a building, whether temporary or permanent, is obviously within the prohibition. I entirely agree with Buckley J. that in the books there may be found a great variety of cases where, with reference to the subject-matter of the covenant and the meaning of what was in question between the parties, a screen or some erection of that nature might be considered a "building" with reference to some covenants and might not be considered a building with reference to others. The subject-matter to be dealt with is to be looked at in order to see what the word "building" means in relation to that particular subject-matter. It is impossible to give any definite meaning to it in the loose language which is used in some cases; anything which is in the nature of a building might be within

H. L. (E.) 1905 PADDINGTON CORPORATION v. ATTORNEY-GENERAL. Earl of Halsbury L.C.

one covenant and the same erection might not be a building with reference to another covenant. I think Buckley J.'s observation was very well founded.

But now, my Lords, I have to look at the word "building" here with reference to this subject-matter and what the Act of Parliament was doing. It is very obvious, I think, that what was intended to be done was to keep this disused burial ground from being used as building ground, to keep it as a place of exercise, ventilation and recreation, and what not,—to prevent anything being done in the nature of building which would interfere with or restrict the free and open use of these spaces as constituted under the statute. But when I look at the question here, I am bound to say that I have to look at it under some difficulty, because I have to consider not only whether a screen is a building, but whether an undescribed screen of unspecified size and nature would be a building within the meaning of the Act. If you put the proposition in the abstract in that way without any reference to concrete facts, it must be put thus: that *any* screen is a building within the meaning of the Act of Parliament. I am not prepared to affirm that proposition. I think Buckley J. was perfectly right—I think it is not a building; and that decision that it is not a building appears to go to a great part of the argument. The open space is not to be used for any other purpose than that which the Act provides—no other purpose than as a place for recreation, enjoyment, or what not. I find nothing in the letters which have been referred to which indicates the slightest restriction of any other purpose in the use of this ground.

My Lords, if one looks at the real substance of the matter and sees what is the meaning of what the parties were upon, it is obviously this: that this public body was aiming, as every private proprietor would do under the circumstances, at preventing certain rights being acquired over this space which would both prejudice the value and prevent the full use of it in future. If this particular space can be built round and rights acquired, whatever may be the use made of it hereafter, you might have a place of this character so completely surrounded by houses of any height that light and ventilation itself might

be seriously interfered with by the rights acquired by twenty years user. It appears to me that this public body was perfectly entitled, for the protection of that which is under their guardianship and which they have to take care of, to prevent this being done. The parties may be commended for not having actually erected this screen, because where the object is simply to prevent the acquisition of a right, it would be convenient first of all to test the question at law; and although it is rather inconvenient to have to pronounce judgment upon a hypothetical screen which does not exist—and the learned counsel has indulged his imagination as to a screen going completely round a space of about a quarter of a mile—yet I think perhaps it was the most convenient form to try the question of law whether any screen of any sort or kind would be admissible for the purpose of preventing prejudicial rights from being acquired.

Looking at the whole question, at the meaning of the statute, and at the existing condition of things, I am of opinion that the judgment of the Court of Appeal is unsound. The learned Lords Justices appear to me to assume a state of things which I do not find to be established here. I think the judgment of Buckley J. is perfectly right; and, under the circumstances, I move your Lordships that the judgment appealed from be reversed.

Lord Robertson. My Lords, I agree with his Lordship on the woolsack that the case was rightly decided by Buckley J. I think that there is great force in his initial observation that it would be an extraordinary proposition that because an open space has been available to the public for enjoyment in an open condition, free from buildings, the result should be to give immediately or by the unavoidable operation of the Prescription Act, to the circumjacent owners, as a matter of right, an easement of light which theretofore they had not enjoyed. When these sections are examined I find it impossible to trace the bringing about of that extraordinary result.

In the first place I think that the vicar has never been ousted of his rights of property, and when I turn to the administration of the body which is charged with preserving the place as an

H. L. (E.) 1905 PADDINGTON CORPORATION v. ATTORNEY-GENERAL. Lord Robertson.

open space it seems to me that, so far from being extraneous to the scope of that administration, what is proposed to be done is completely within it. I think that the erection of a screen is, or may be, entirely consistent with the purpose of maintaining this place as an open space for public enjoyment and in furtherance of that purpose. No one can say that a recreation ground, surrounded by flats seven storeys high and looked into from all the windows of that building, is, necessarily, as good a recreation ground as one more open to the sun and less overlooked. Accordingly, just as Cozens-Hardy L.J. says that these administrators could erect a tool-house, that being in furtherance of the primary purpose of the administration, so I think this erection is within that purpose. Of course, I do not imply that it is the duty of all administrators of open spaces to surround their open spaces with screens; all that I say is that it is within the rights which have never been taken away from the proprietors and administrators of these grounds; and it may be a step to be taken in furtherance of the purposes with which they are charged. What I have said bears relation directly to the argument of Cozens-Hardy L.J., which, indeed, was maintained by Mr. Astbury at the Bar.

On the other question as to whether any screen is necessarily a building, that proposition seems to me entirely inconsistent with the most obvious physical facts.

On these grounds, I think the judgment of the Court of Appeal was wrong and the judgment of Buckley J. right.

Lord Lindley. My Lords, I am entirely of the same opinion. The injunction granted by the Court of Appeal to my mind goes a great deal too far. There is not the slightest evidence to warrant the notion that the defendants or any of them intended to erect a building on this land. They have put up a screen; but a screen is not prohibited. Screens are of all sorts and kinds, and I can imagine screens which are obviously not buildings and which would be justified by the statutory powers conferred upon these public bodies. This open space may be preserved, and prima facie ought to be preserved, as a place of recreation and as more or less of a garden. It would in my

opinion be wrong to grant an injunction to restrain these defendants from planting biggish trees in front of these windows unless the trees would interfere with already acquired rights of light. How could it be possible to maintain an injunction to restrain such planting? That shews that the Court of Appeal has gone too far.

I entirely adopt the view taken by Buckley J. I think that he has put the true construction on the Acts, and I agree that the appeal ought to be allowed, with costs here and below.

Order of the Court of Appeal reversed and order of Buckley J. restored with costs here and below: cause remitted to the Chancery Division.

Lords' Journals, November 14, 1905.

Solicitors: *John H. Hortin, Cheston & Sons.*

[HOUSE OF LORDS.]

ELLIOTT . . . . . APPELLANT;

AND

CRUTCHLEY AND ANOTHER . . . . . RESPONDENTS.

Contract—Performance Impossible—Payment made "on Account of" Contract —Express Provision in the Event of no Expense being incurred.

A caterer agreed to supply refreshments at a fixed price to the respondents on the occasion of a naval review to be held on a named day, "300*l.* to be paid to the caterer on account of the refreshments on the Monday previous to the review day," it being expressly stipulated that in the event of the cancellation of the review before any expense was incurred by the caterer there should be no liability on the respondents. A few days before the named day it was known that the review would not be held. The caterer had spent about 20*l.* in crockery, &c., but incurred no expense in providing refreshments. The caterer having sued the respondents upon a cheque for 300*l.* given by them to him in advance in accordance with the contract:—

Held, that upon the true construction of this particular contract the respondents were not liable in respect of refreshments, and could not be sued upon the cheque.

The decision of the Court of Appeal, [1904] 1 K. B. 565, affirmed.

In March, 1902, the appellant, a caterer, offered in writing to the respondents to supply refreshments at a fixed price to the

H. L. (E.) 1905 ELLIOTT v. CRUTCHLEY.

passengers on board a steamer on the occasion of the naval review to be held on June 28 in connection with the King's Coronation; 300*l.* to be paid to the appellant on account of the refreshments on the Monday before the review day. These terms were accepted by a letter from the respondents, the postscript of which said, "It is of course understood that in the event of the cancellation of the review before any expense is incurred by the caterer there shall be no liability on our side." The appellant spent about 20*l.* for crockery, knives and forks, and tickets, but incurred no expense in providing refreshments. On June 23 the respondents sent the appellant a cheque for 300*l.* On June 24 it was known that owing to the King's illness the review would be cancelled. Payment of the cheque having been stopped the appellant sued the respondents upon it. Ridley J. gave judgment for the respondents (1), and this decision was affirmed (2) by the Court of Appeal (Collins M.R., Romer and Mathew L.JJ.).

Witt, K.C., and *A. P. Poley*, for the appellant, cited the cases referred to in the Court below, and contended that the express provision did not stipulate for a return of the money or cheque.

Shearman, K.C., and *Eustace Hills*, for the respondents, were not heard.

EARL OF HALSBURY L.C. My Lords, we are all of opinion that this appeal must be dismissed. It is said that the construction we adopt is not at all applicable to the language used, but we may comfort ourselves with the reflection that four persons who are not unfamiliar with the business have construed these words in the way in which we construe them.

I entirely agree with Mr. Witt's protest, a very solemn protest, against making a contract for the parties. I agree with him that it would be most improper to depart from the contract they have made, and to make what we consider to be a fairer contract. The only observation I have to make in reply to that is that neither the Court below nor ourselves had or have the least idea of doing anything of the kind.

(1) [1903] 2 K. B. 476. (2) [1904] 1 K B. 565.

The question we have to determine is what is the real business meaning of the contract which has been made by the parties? It is a contract made, not in the formal method of a contract reduced to writing by a lawyer, but made in the business-like communications of the parties with each other in letters. When I look at the letters I cannot entertain the least doubt that what they really meant was what they said, namely, that if the review went off there was to be no liability; and then, of course, the one thing is correlative to the other: if there is no liability on the one side, there is to be none on the other. That is, indeed, what they did say in one of the earlier letters, and, in fact, it follows from the contract itself.

My Lords, if one looks at the situation of the parties—at what they were dealing with and the contingency which they both contemplated, namely, the possibility of the review going off—there is no room for doubt as to what they meant. I entirely agree with the whole of the Court of Appeal, and with Ridley J., that as a fact what they meant was that in the event which happened there should be no other liability than that which had been already incurred by the contractor. I understand there has never been any dispute that he ought to be paid back the expense which he had already incurred, and which amounted to 20*l.* But in regard to the cheque on which the action is brought for 300*l.*, which was to be given in respect of refreshments, it seems to me to be perfectly clear that there is no liability in respect of that matter.

Therefore, my Lords, I am of opinion that this appeal ought to be dismissed with costs, and I move your Lordships accordingly.

LORD ROBERTSON. My Lords, I agree. I cannot profess to think the matter either doubtful or difficult.

LORD LINDLEY. My Lords, I am entirely of the same opinion. This is simply an action on a cheque, to recover the amount of the cheque, viz., 300*l.*, neither more nor less. It is impossible to my mind to read the two letters of March 4 and 5, and come to the conclusion that this action for 300*l.* can lie.

H. L. (E.) 1905 ELLIOTT v. CRUTCHLEY. Lord Lindley.

The appellant's construction of these letters is not the meaning of the parties. I entirely adopt the true and fair construction put upon those letters by the Court of Appeal.

Order of the Court of Appeal affirmed and appeal dismissed with costs.

Lords' Journals, November 21, 1905.

Solicitors: *Samuel Price & Sons*; *Dowson, Ainslie & Martineau.*

[HOUSE OF LORDS.]

H. L. (E.) 1905 *Nov.* 21.

ASHTON GAS COMPANY . . . . . APPELLANTS;

AND

ATTORNEY-GENERAL AND OTHERS . . . RESPONDENTS.

Revenue—Income Tax—Gas Company—Standard Rate of Dividend—Payment of Dividend free of Income Tax—Income Tax Act, 1842, *c.* 35, *ss.* 40, 54, 60, *Sched. A, No. III., r.* 3.

By the special Act of a gas company it was provided that the profits to be divided among the shareholders in any year should not exceed a given rate:—

Held, that in arriving at the rate of dividend the profits ought to be calculated as inclusive and not exclusive of the amount payable for the year in respect of income tax.

The decision of the Court of Appeal, [1904] 2 Ch. 621, affirmed.

BY S. 17 of the Ashton Gas Act, 1877, it was enacted that except as in the Act provided, the profits of the Ashton Gas Company to be divided among the shareholders in any year should not exceed the rate of 10*l.* per cent. per annum on the ordinary share capital. By other sections (which are set out in the report of the decision below) the rate varied according to a sliding scale dependent upon the price charged for gas.

The company paid the dividends in full without deduction for income tax, and attached to the dividend warrant a certificate that income tax on the profits of which the dividend formed part had been or would be duly paid by the secretary

to the proper officer for the receipt of taxes. The Attorney-General (at the relation of the Ashton-under-Lyne Corporation) and the corporation having brought an action against the gas company, Buckley J. adjudged and declared that the profits ought to be calculated as inclusive and not exclusive of the amount payable for the year in respect of income tax on the profits proposed to be divided. This decision was affirmed by the Court of Appeal (Vaughan Williams, Romer, and Cozens-Hardy L.JJ.). Hence the present appeal.

H. Terrell, K.C., and *W. M. Cann*, for the appellants. The income tax is payable by the company under s. 60 of the Income Tax Act, 1842, Sched. A, No. III., r. 3, and does not come under Sched. D. The tax is a charge on the profits before distribution to the shareholders: it is one of the charges which may be deducted before arriving at the profits and calculating the dividend. The tax is charged upon the company, not upon the members. The Ashton Gas Act, 1877, by s. 16 authorizes the company to adopt the principle upon which it has acted. [They referred to *Last* v. *London Assurance Corporation*. (1)]

Danckwerts, K.C. (*R. J. Parker* with him), for the respondents, referred to *Mersey Docks* v. *Lucas* (2), and was stopped.

H. Terrell, K.C., in reply.

EARL OF HALSBURY L.C. My Lords, but for the somewhat complex character of the dividend arrangements of this company I should say that this is a clear case. The Legislature has laid it down that the shareholders in this company shall get not more than 10 per cent. dividend on their shares. That seems to me a very clear proposition, and when one analyzes the facts in this case, I should have thought that the whole thing would have been settled in five minutes. But there is a somewhat difficult and complex machinery which makes the officers of the company officers of the Financial Department of the Government for the purpose of collecting the tax. Well, let us suppose that we get rid of the machinery altogether, and that the company are relieved from the necessity of collecting the tax for the

(1) (1885) 10 App. Cas. 438, 445. (2) (1883) 8 App. Cas. 891.

H. L. (E.) 1905 ASHTON GAS COMPANY v. ATTORNEY-GENERAL. Earl of Halsbury L.C.

Government. Let us suppose that instead of that machinery the shareholder is left face to face with the Government collector, and that instead of acting as the Government receivers, the company simply pays the 10 per cent. to the shareholder and allows the shareholder to give his accounts to the proper Government officer. The company having paid 10 per cent., and it having been ascertained what the proper quota of the shareholder would be in respect of the income tax, suppose the company give to the shareholders besides the 10 per cent. they have already given him the quota for the income tax also, will they or will they not have given the shareholder more than 10 per cent. for his dividend? It is obvious that they will have given him the amount, we will call it x, which is due in respect of dividend, plus y, which is the amount of the income tax which is due from him.

My Lords, so presented the case appears to me to be perfectly clear. The fallacy has been in arguing as if you can deduct from the income tax which you have got to pay something which alters what is the real nature of the profit. Now the profit upon which the income tax is charged is what is left after you have paid all the necessary expenses to earn that profit. Profit is a plain English word; that is what is charged with income tax. But if you confound what is the necessary expenditure to earn that profit with the income tax, which is a part of the profit itself, one can understand how you get into the confusion which has induced the learned counsel at such very considerable length to point out that this is not a charge upon the profits at all. The answer is that it is. The income tax is a charge upon the profits; the thing which is taxed is the profit that is made, and you must ascertain what is the profit that is made before you deduct the tax—you have no right to deduct the income tax before you ascertain what the profit is. I cannot understand how you can make the income tax part of the expenditure. I share Buckley J.'s difficulty in understanding how so plain a matter has been discussed in all the Courts at such extravagant length.

In *Last* v. *London Assurance Corporation* (1), which was decided

(1) 10 App. Cas. 438, 445.

a good many years ago, one can understand the argument that was there suggested as to the bonuses of an insurance company. It was argued: You pay a bonus in order to induce people to become shareholders in your undertaking; therefore it is one of the necessary expenditures to induce people to come in. But the Court of Appeal, and this House afterwards, refused to acquiesce in that argument. They said: That is not true; you must ascertain first the income, you must ascertain what the income tax is levied upon; that is to say, the profit of the undertaking is first to be ascertained, and when you have found out what the profit of the undertaking is, you have then to tax that as profit. Really the whole question comes back to the definition of the word "profits." When once you have defined what the word "profits" means it is perfectly clear what the result of this case must be.

I am of opinion that the judgment of the Court of Appeal is absolutely right, and I move your Lordships that the appeal be dismissed with costs.

LORD ROBERTSON. My Lords, the whole argument of the appellants is rested upon the words of Sched. A read out of all relation to the subject-matter of the enactments. What has got to be remembered, and not to be ignored, is that Sched. A merely provides a formula for ascertaining the income arising from the ownership of lands. It is an artificial and rather elaborate method of estimating income, but what it yields is, on the theory of the Act, income—none the less than if the question arose under any of the other schedules.

Now if this be so, there is no room for argument. The view of the appellant really implies that the tax under Sched. A is not income tax at all; and I am not sure that the reasoning would not lead to the shareholders' own part of the proceeds being taxed over again, this time as income tax.

I entirely agree in the judgment of Buckley J.

LORD LINDLEY. My Lords, I am entirely of the same opinion. The reasoning of Buckley J.'s judgment appears to me to be

H. L. (E.) 1905

ASHTON GAS COMPANY v. ATTORNEY-GENERAL.

Lord Lindley.

absolutely unanswerable, notwithstanding the very ingenious argument of the appellants' counsel against it.

Order of the Court of Appeal affirmed and appeal dismissed with costs.

Lords' Journals, November 21, 1905.

Solicitors: *Burgess, Cousens & Co., for Arthur Buckley, Manchester; Sharpe, Parker & Co., for F. W. Bromley, Ashton-under-Lyne.*

[HOUSE OF LORDS.]

H. L. (E.) 1905

Nov. 23.

CHARLESWORTH . . . . . APPELLANT;

AND

WATSON AND OTHERS . . . . . RESPONDENTS.

Mine—Mining Lease—Construction—Covenant to win, work and get fairly, duly and honestly the whole of the Coal.

By a mining lease a seam of coal under land of the lessors was demised for a term of years at an annual rent, and until the working began at a nominal dead rent, and the lessees covenanted that they would at all times during the term fairly, duly and honestly win, work and get the whole of the seam in a proper and workmanlike manner. Owing to difficulties in working it was found to be impossible to work the coal without heavy pecuniary loss, and the lessees therefore abandoned the undertaking:—

Held, that upon the true construction of this particular lease the lessees had broken their covenant, and were liable in damages to the lessors.

The decision of the Court of Appeal, [1905] 1 K. B. 74, affirmed.

THE facts of this case were stated by an arbitrator in a special case which is fully set out in the report of the decision below. Briefly, they were as follows:—

In 1885 the respondents demised to the appellant and another for twenty-one years part of a seam of coal with powers for working and winning the coal, the lessees paying as soon as they should begin working a certain annual rent per acre, and until they should begin, a rent of 5*l.* a year. The lessees covenanted (inter alia) that they would at all times during the term fairly, duly and honestly win, work and get the whole of the demised seam in a proper

and workmanlike manner. Also that they would not desist from working and using any of the workings until all the coal which could with ordinary safety to the workmen or according to the ordinary method of working be first got. Also that they would not in working the seam sink any pit or break open or injure the surface of the lessors' lands under which the seam was situate.

The lessees paid the 5*l.* a year for several years, but, owing to difficulties in the working, came to the conclusion that the working would not be profitable, and therefore (as the arbitrator found) prudently abandoned the undertaking, upon which they had spent large sums. Channell J. construed the lease to mean that the lessees had an option and were not liable for damages for breach of covenant. This decision was reversed by the Court of Appeal (Collins M.R., Stirling and Mathew L.JJ.), who held that the lessees had committed a breach of the covenant to work fairly, &c., and were liable to the lessors for the damages found by the arbitrator in one of his alternative awards. Hence the present appeal.

Nov. 21. *C. A. Russell, K.C.*, and *Ashworth James*, for the appellant, cited the cases and urged the arguments upon the construction of the lease, which are clearly and amply stated in the report below. They also cited *Lord Abinger* v. *Ashton*. (1)

Neville, K.C., and *MacSwinney*, for the respondents, were not heard.

Nov. 23. Earl of Halsbury L.C. My Lords, it appears to me that the judgment of the Court of Appeal is absolutely right, and I do not think it necessary to expand the views they have expressed. The question comes very shortly to this, whether, when there is an undoubted obligation to work coals, you can cut down that obligation by words which do not qualify the obligation to work. The adverbs which are used in the lease in connection with the words winning and working seem to me wholly inappropriate to qualify and cut down the original obligation. I hesitate very much to think that, the words being such as they are, one could qualify and cut down the initial obligation by looking at what

(1) (1873) L. R. 17 Eq. 358.

H. L. (E.) 1905 CHARLESWORTH v. WATSON. Earl of Halsbury L.C.

the nature of the transaction is; still, if one does look at it, it appears to me to point in the other direction. Both parties supposed that there was coal here; and if there was coal, is it to be supposed that for 5*l.* a year the attempt to get profit out of this, which both parties assumed was a field of coal, was to be suspended for twenty-one years at the option of the person who took the lease? One could well understand that where the dead rent is of such magnitude that it would of itself be the heaviest burden upon the lessee if he does not work, in that case, having regard to the nature of the obligation entered into, you may not require an absolute covenant to work; but where the dead rent is of so comparatively trifling a character as this—5*l.* a year for twenty-one years—to say that it is to be at the option of the lessee whether he will work or not seems to me to be a very unreasonable and unbusiness-like arrangement. To my mind, if one were once at liberty to consider the question whether it is a likely covenant to be entered into or not, I should come to a conclusion the other way; but I do not depend upon that. To my mind the sole question is whether there is or is not an absolutely clear obligation to work. I think there is, and under those circumstances I move your Lordships that the appeal be dismissed with costs.

LORD ROBERTSON. My Lords, the broad facts of this case are exceedingly simple. There is a lease of this field of coal for twenty-one years from 1885. In 1898, or the beginning of 1899, the colliery people intimate that they have dismantled and abandoned the working by which alone they proposed to work this coal seam. Accordingly, prima facie it would appear that there is the clearest possible claim for damages for a breach of the contract which was knowingly entered into by those parties. The obligation as regards the winning and the working is that they are to win and work honestly, and a variety of laudatory epithets are applied. How those words limiting their operations to operations of a legitimate kind can take away their obligation to go on working I cannot see. If there had been a very long time taken in reaching the mine, I can quite understand that questions might have arisen as to whether that period had not

been unduly prolonged; but in this case the avowed abandonment of the working lifts us out of that region altogether.

We have therefore simply to construe the clause to which I have referred. I read that clause as containing first of all the obligation both to win and to work, and then a qualification of that by saying that it must be well done. But why you should say that because you are obliged to do a thing well you are absolved from doing it at all passes my conception.

The argument was presented in a very sharp and clear form by both the learned counsel, if I may say so particularly by the learned junior. Therefore we understand the question as it arises in this case. I cannot accede to the view that by the particularity and care in defining the mode of the operations, there is absolution given from entering upon those operations at all.

Lord Lindley. My Lords, I have come to the same opinion. I was rather struck the other day by the observations made by the learned counsel for the appellant and by a passage which was read from the judgment of Sir George Jessel in *Lord Abinger* v. *Ashton*. (1) I have since looked at that, and I think I see what was meant by it. Sir George Jessel there had to construe a covenant which was badly drawn and open to more interpretations than one. One of the interpretations he suggested it might bear was that which was urged upon us as the true interpretation to be put upon this lease. But really and in substance it comes to this, that under a lease like this the lessee has an option whether he will work or not. That is a very startling proposition. I have looked into all the authorities I could find upon the subject, and I can find no warrant whatever for it. I am bound to say that upon the true construction of this covenant I agree entirely with the Court of Appeal.

Order of the Court of Appeal affirmed and appeal dismissed with costs.

Lords' Journals, November 23, 1905.

Solicitors: *Clements, Williams & Co., for Brown, Wilkin & Scott, Wakefield; T. B. & W. Nelson, for Nelson, Eddison & Lupton, Leeds.*

(1) L. R. 17 Eq. 358.

Distinguished. MOHANLAL HARGOVIND OF JUBBULPORE *v.* COMR. OF INCOME TAX. [1949] 2 All E.R. 652.

[HOUSE OF LORDS.]

H. L. (E.) 1905

ALIANZA COMPANY, LIMITED . . . . . APPELLANTS;

AND

Nov. 28.

BELL . . . . . RESPONDENT.

Revenue—Income Tax—Nitrate Grounds situate Abroad—Profits and Gains—Deduction to meet Exhaustion of Material—Deduction on account of Diminution of Capital—Income Tax Act, 1842, *c.* 35, *s.* 100, *Sched. D. First Case, r.* 3; *s.* 159.

An English company owned land abroad which they had bought for a large sum, and where they carried on a manufacture of nitrates and iodine by working up certain deposits found on the land. In estimating their yearly profits and gains from the sale of the nitrates and iodine for assessment to the income tax under Sched. D:—

Held, that the company were not entitled to make any deduction in respect of the exhaustion of the deposits.

The decision of the Court of Appeal, [1905] 1 K. B. 184, affirmed.

FROM a case stated by the Commissioners of Income Tax it appeared that the appellants were an English company with a registered office in England. They owned land in Chili, upon which were deposits. The company dug up the deposits and worked them by certain processes, whence nitrates and iodine were produced. The gross profits were wholly derived from the sale of the nitrates and iodine. The Commissioners were of opinion that when the deposits had been worked out and exhausted the machinery and plant would be of little value. In estimating the profits and gains for the year ending April 5, 1901, the company claimed to make a deduction in respect of the exhaustion of the raw material worked up during that period. The Commissioners disallowed the claim.

Channell J. held that the Commissioners were right (1), and this decision was affirmed by the Court of Appeal (Collins M.R., Stirling and Mathew L.JJ. (2) Hence the present appeal.

Nov. 27, 28. *Danckwerts, K.C.*, and *Bremner* for the appellants. If this were a case of lands in Great Britain the deduction could not be claimed, because it would fall under Sched. A,

(1) [1904] 2 K. B. 666. (2) [1905] 1 K. B. 184.

which requires the assessment to be made upon the "annual value": *Coltness Iron Co.* v. *Black.* (1) The lands being situate abroad the assessment falls under Sched. D, and is upon the balance of profits and gains. In estimating the profits and gains a deduction must be made for exhaustion of the soil from which the raw material for the manufacture is derived. It is clear that if the company had to buy the raw material every year they would be entitled to deduct the price paid for it as well as the expense of working it up. This is not a deduction on account of repairs, or capital withdrawn, or of any sum employed as capital, or on account of diminution of capital. It is simply for the necessary cost of the raw material. That the raw material was purchased in a lump sum once for all when the land was acquired cannot make any difference in principle. On every sound rule of business allowance must be made for this expense. [They referred to the cases cited in the Court below.]

Sir Robert Finlay, A.-G., Sir Edward Carson, S.-G., and *Rowlatt,* for the respondent, were not heard.

LORD MACNAGHTEN. My Lords, I do not think it is necessary to say more than a very few words. I think your Lordships are satisfied with the judgment of the Court of Appeal and the reasons by which that judgment is enforced. It appears to me that this claim is prohibited by the third rule, being a claim in respect of money employed as capital. For these reasons I move your Lordships that this appeal be dismissed and that the appellants pay the costs.

LORD ROBERTSON. My Lords, I think it is undesirable that any doubt should be thrown upon a settled course of decisions on the income-tax law, and it seems to me that, although Mr. Danckwerts has argued this case with a vigour and zest which did full justice to his case, the arguments he has advanced are of a most familiar character. It is under Sched. D that the case is to be judged. Then, is this capital which he proposes to obtain a deduction for? That seems to me to be entirely concluded by the facts in the case. There is no doubt whatever

(1) (1881) 6 App. Cas. 315.

H. L. (E.) 1905

ALIANZA COMPANY, LIMITED v. BELL.

Lord Robertson.

that the scheme of the enterprise of this company was to invest their capital in the acquisition of this property and then to proceed to work it as a mining concern.

That being so, the Master of the Rolls seems to me to be abundantly justified in saying that this is merely another case where capital has been embarked in a wasting subject-matter. The whole of the argument of Mr. Danckwerts is really founded upon what I suppose no one would doubt, that as the output takes place there is a consumption of a certain proportionate amount of the capital; but that is concluded, as my noble and learned friend on the woolsack has said, by r. 3.

Further, I agree with Stirling L.J. that s. 159 is never to be laid out of account in these instances, because in its express prohibition of an allowance being made for capital, it on the face of it refers to all the various cases under the various schedules. Accordingly, the argument that there is something peculiar to Sched. A in the principle which has been applied in the cases which have been mentioned fails before the universal conspectus which in express terms is given by s. 159 to this very principle.

LORD LINDLEY. I am entirely of the same opinion. It appears to me it is quite impossible to get out of r. 3.

Order of the Court of Appeal affirmed, and appeal dismissed with costs.

Lords' Journals, November 28, 1905.

Solicitors: *Ashurst, Morris, Crisp & Co.; Solicitor of Inland Revenue.*

[HOUSE OF LORDS.]

UNDERGROUND ELECTRIC RAILWAYS COMPANY, OF LONDON, LIMITED . } APPELLANTS;

AND

COMMISSIONERS OF INLAND REVENUE. RESPONDENTS.

H. L. (E.) 1905 *Dec.* 15.

Revenue — Stamp — Conveyance — Ad Valorem Duty — Consideration — Consideration Payable on Contingency — Stamp Act, 1891, *c.* 39, *s.* 56, *sub-s.* 2, *s.* 57.

Part of the consideration for the sale of a company's assets to another company was that the buying company should pay out of its profits to the selling company an annual dividend of 3 per cent. upon capital issued, after paying to its own shareholders a 5 per cent. dividend upon its shares:—

Held, that the dividend of 3 per cent., though payable on a contingency or more than one contingency, was "money payable periodically" within the meaning of the Stamp Act, 1891, c. 39, *s.* 56, sub-s. 2,

The decision of the Court of Appeal, [1905] 1 K. B. 174, affirmed,

IN 1902 the Metropolitan District Electric Railways Company, Limited, agreed by deed with the appellant company to sell to them certain assets. The deed provided that the profits of the appellant company should be applied first in payment of a cumulative dividend at 5 per cent. per annum, up to the end of such year, on the amount paid up on any shares issued by the appellant company, and secondly in paying to the selling company or its assigns, as a further part of the consideration for the sale, such a sum as should be equal to a dividend of 3 per cent. for such year on the amount for the time being paid up on such of the original ordinary share capital of 5,000,000*l.* in the appellant company as should for the time being have been issued by the appellant company.

The question was whether the 3 per cent. dividend payable to the selling company was "money payable periodically for a definite period exceeding twenty years, or in perpetuity or for any indefinite period not terminable with life," within the meaning of the Stamp Act, 1891, c. 39, s. 56, sub-s. 2, so as to make the conveyance chargeable in respect of that consideration

H. L. (E.) 1905

UNDERGROUND ELECTRIC RAILWAYS v. INLAND REVENUE COMMISSIONERS.

with ad valorem duty. Channell J. held that it was not. (1) This decision was reversed by the Court of Appeal (Collins M.R., Stirling and Mathew L.JJ.). Hence the present appeal.

Nov. 20. *Roskill, K.C.*, and *Austen-Cartmell*, for the appellants, contended that the 3 per cent. payable to the appellants depended, first, on the event of the profits being more than sufficient for the payment of the 5 per cent. dividend, and secondly on the amount for the time being paid up on the issued original capital of the appellants, an amount incapable of computation; that no sum might ever be payable; that it was not a sum payable "periodically" within the Stamp Act; and that s. 56, sub-s. 2, did not include moneys payable on a contingency or more than one contingency. They also referred to the cases cited in the Courts below.

Sir R. Finlay, A.-G., and *Rowlatt* (*Sir E. Carson, S.-G.*, with them), for the respondents.

Roskill, K.C., in reply.

Dec. 15. EARL OF HALSBURY. My Lords, I have had an opportunity of reading the opinion upon this case, which my noble and learned friend, Lord Lindley, has written. I quite concur in it, and have nothing to add.

LORD ROBERTSON. My Lords, I think the judgments in the Court of Appeal are right.

LORD LINDLEY. My Lords, when the stamp duty payable on the conveyance in this case had to be ascertained, part of the consideration for the sale was 3 per cent. of the then paid up capital of the purchasing company. This sum was a minimum sum and it was payable periodically for an indefinite time. The amount payable in future was liable to be increased, but not to be diminished, except in certain events, to which I will now allude. One of these events, and the only one in my opinion which creates any difficulty, was the possible insufficiency of the profits of the company to pay the amount referred to after paying

(1) [1904] 2 K. B. 198.

a dividend of 5*l.* per cent. on the paid-up capital of the company. That dividend of 5 per cent. had to be paid out of the profits of the new company to its shareholders before any further payment became payable to the selling company. The minimum sum payable periodically was so payable subject to a contingency, viz., the existence of a sufficiency of profits to pay first a dividend of 5 per cent. and then a further dividend of 3 per cent. We have therefore an ascertained minimum amount payable periodically as part of the consideration of the sale, but payable on a contingency. Is such a sum within s. 56, clause 2 of the Stamp Act, 1891? Its language is very wide.

It is contended that the words "money payable periodically" in that section do not apply to money payable on a contingency, because contingent payments are dealt with by s. 57. I do not myself see how s. 57 assists the appellants. Its effect seems to be that where the consideration for a sale consists of money payable on a contingency, such money is to be taken into account in ascertaining the stamp duty to be paid on the conveyance of the property sold. I see nothing in s. 57 which either cuts down or excludes s. 56. It is also contended that the words "money payable" in s. 56 do not include money payable upon a contingency, because the contingency may never happen and no money may be payable. But the words of s. 56 appear to me to be wide enough to cover all moneys which may become payable, and the latter part of clause 2 certainly favours this construction. Moreover, s. 57 says that money payable on a contingency is to be taken into account; and that, to my mind, removes any doubt which might otherwise arise as to the inclusion of contingent payments in s. 56.

Then it is said that the purchasing company may be wound up, or may at some future time reduce its capital and so reduce in future the minimum sum payable periodically to the selling company. No doubt these are possible events, but at most they are merely other contingencies on which the payment of the minimum sum depends. Unless the contingency of winding up or reducing the capital happens, the minimum sum continues to be payable. The fact that the minimum sum is payable on more contingencies than one is in my opinion quite immaterial. They

H. L. (E.) 1905 — UNDERGROUND ELECTRIC RAILWAYS v. INLAND REVENUE COMMISSIONERS. — Lord Lindley.

merely affect the ability of the purchasing company to pay, which is the only contingency of any importance.

For these reasons, I am of opinion that the decision of the Court of Appeal was correct, and that this appeal should be dismissed with costs.

Order of the Court of Appeal affirmed, and appeal dismissed with costs.

Lords' Journals, December 15, 1905.

Solicitors: *Bircham & Co.; Solicitor of Inland Revenue.*

[HOUSE OF LORDS.]

H. L. (E.) 1905 — *Dec.* 15.

MACLEAY . . . . . APPELLANT;

AND

TAIT . . . . . RESPONDENT.

Company—Prospectus—Non-disclosure of Contracts—Directors' Liability—Proof of Damage—Waiver Clause—Companies Act, 1867, *c.* 131, *s.* 38.

To recover damages under s. 38 of the Companies Act, 1867, a plaintiff who has subscribed for shares on the faith of a prospectus which did not disclose a material contract must prove that he has sustained damage, and that if he had known of the undisclosed contract he would not have become a shareholder.

Where there is no fraud in fact and the non-disclosure is owing to an honest mistake, a subscriber for shares who has agreed to waive any fuller compliance with s. 38 than is contained in the prospectus cannot maintain an action for damages.

The decision of the Court of Appeal, [1904] 2 Ch. 631, reversed on the above grounds.

THE respondent subscribed for shares in the Standard Exploration Company, Limited, as he alleged upon the faith of a prospectus issued with the sanction of the appellant, a director of the company. The prospectus omitted to mention a material contract of October 27, 1898, with respect to the acquisition by the company of the undertaking and assets of the Austin Friars Syndicate. In applying for the shares the respondent agreed "to waive any fuller compliance with s. 38 of the Companies Act, 1867, than

is contained in the said prospectus." The company having been wound up the respondent brought an action for damages against the appellant, in which (as this House held) he failed to prove damage or that he would not have taken the shares if he had known of the undisclosed contract. A declaration was made by the Court of Appeal (varying a judgment of Kekewich, J.) that the prospectus was to be deemed to be fraudulent by reason of the omission to specify the dates and the names of the parties to the contract of October 27, 1898, with an inquiry as to damages in certain events. (1) Hence the present appeal.

Nov. 17. *Younger, K.C.*, and *Ashton Cross*, for the appellant. To maintain this action the plaintiff must prove two things, neither of which he has proved, viz., damage, and that if he had known of the omitted contract he would not have subscribed for the shares. This is the result of the authorities. The ground upon which the Court of Appeal decided is not satisfactory. The appellant did not "knowingly issue" the prospectus within the meaning of s. 38 of the Companies Act, 1867. Moreover the waiver clause, being a bona fide one and not fraudulent, protects the appellant.

[They cited the cases referred to by Lord Lindley in his judgment.]

Hughes, K.C., and *W. Higgins*, for the respondent, contended that the decision of the Court of Appeal was right and that the plaintiff had proved all that was necessary to maintain the action.

The House took time for consideration.

Dec. 15. EARL OF HALSBURY. My Lords, both of these actions (2) are actions for damages, complaining that the respective plaintiffs have been injured by the fraud of the defendants, and claiming damages for the loss they have sustained by the fraud of which they complain. As the actions are identical in their merits, I will, in what I have to say

(1) [1904] 2 Ch. 631.

(2) A similar action was brought by one Trechmann against General Calthorpe, which raised a similar appeal.

H. L. (E.) 1905

MACLEAY v. TAIT.

Earl of Halsbury

hereafter, treat the matter as if there were one plaintiff and one defendant.

But for the 38th section of the Companies Act, 1867, it is certain that neither of these actions would have been brought, and the real question to be debated is whether that section does, or rather did, more than enact that where a contract which ought to have been inserted in a prospectus is omitted, such omission shall be held to be fraudulent. That is what the section in terms enacted, and I think it did no more.

Now, in order to entitle a plaintiff to recover damages where he sues for damages by reason of a fraud upon himself, he must prove that he has sustained the damages which he claims; and as one step towards that proof he must shew that he has acted on the faith of the fraudulent statement. It is an old judicial observation, that fraud without damage or damage without fraud will found no action.

Now, in the class of cases where misstatements have been made in a prospectus, and people have been led by attractive statements in the prospectus to take shares, the taking of which has led to loss, I have said more than once, and still think that it is quite a fair inference to draw, that if the prospectus is calculated to induce people to take shares, and they do take shares, the prospectus, tainted with falsehood as it is, has acted as a whole, and people cannot be expected to analyze their own mental sensations so minutely as to be able to explain what particular statement had induced them to become subscribers.

But the question under this section is a very different one; and I think to enable a plaintiff to recover damages he must convince the tribunal before whom the question comes, that if he had known of the omitted contract he would not have become a shareholder. That is what he must prove. Now in this case I do not believe, for the reasons to be given by my noble and learned friend, Lord Lindley, that there would have been the smallest difference in the plaintiff's conduct if the contract in question had been disclosed; and although it ought to have been disclosed, I think it was not disclosed by reason of a mistake. I have had the satisfaction of reading what Lord

Lindley has written on that part of the subject, and I entirely concur with him.

I also agree with him as to the waiver clause. Where a clause of that sort has been inserted as part of what I may call the machinery for fraud, it will, of course, afford no protection to those who have contrived it; but where, as in this case, it is a perfectly honest slip, why should not that slip be cured by the waiver clause? I know no reason.

I move, therefore, that both appeals be allowed, and that both actions be dismissed with costs, both here and below.

Lord Robertson. My Lords, it is, in my opinion, quite clear that the statute, by declaring a prospectus to be fraudulent, does not dispense the person founding on the fraud from proving that damage has resulted from the fraud. This is plain on principle; and, if that were needed, there is good authority for it.

On the other hand, the vice of the prospectus being an omission, the question whether, if that omission had not taken place, the result would not have been the same—that is to say, the shares would have been taken—is one requiring cautious and delicate handling. I do not think it an insoluble question, as has been suggested. But even for the person whose election to take or not to take is in debate, and even supposing him to speak with absolute candour, it requires a mind of singular clearness to decide how he would have acted if the omitted contract had been named; and it has to be borne in mind that it is not how he ought in reason to have decided, but how he (the particular individual) would have decided, that has got to be ascertained. Accordingly, one has to make full allowance for all sorts of considerations and prejudices—that the contract made one too many and the thing too complicated—or that he did not like the names of the people, and so on.

Now, applying this view to the present case, I cannot join in any emphatic assertions about the conclusiveness of the evidence. But I take into account the nature of the omitted contract and the account given by this gentleman of his views of the enterprise, and I think it safe to infer that the omission of this

H. L. (E). 1905

MACLEAY v. TAIT.

contract did not affect his decision to apply for shares, and that he would not have acted otherwise if it had been mentioned.

On this ground I agree in the reversal proposed.

LORD LINDLEY. My Lords, both of these appeals turn on the true construction of s. 38 of the Companies Act, 1867, and of the application of that section to the facts of the cases which have to be considered. Before attempting to apply the section to those facts it will be convenient to examine the section itself and the construction which has been judicially put upon it. The section consists of two parts. The first states that a company's prospectus must contain certain particulars; the second declares that a prospectus which does not contain these particulars "shall be deemed fraudulent on the part of the promoters, directors, and officers of the company knowingly issuing the same as regards any person taking shares on the faith of such prospectus, unless he shall have had notice of such contracts." The particulars which are required to be stated "are the dates and names of the parties to any contract entered into by the company or the promoters, directors, or trustees thereof, before the issue of such prospectus." The section says no more.

When the section has to be applied to any particular case, i.e., when a plaintiff sues a defendant for damages for a breach of duty imposed by this section, the following questions necessarily arise, viz.—(1.) Is the document to which the plaintiff says no reference is made in the prospectus such a contract as is described in the first part of the section? If it is not such a contract, there is an end of the case. If it is, and if it is not disclosed, then it is necessary to inquire (2.) Whether the defendant was a promoter, director, or officer of the company? (3.) Whether he knowingly issued the prospectus? (4.) Whether the plaintiff took shares on the faith of the prospectus? (5.) Whether he had notice of the undisclosed contract before he applied for his shares?

Assuming that all these questions are answered in the plaintiff's favour, there are still other questions, as to which the section is wholly silent, viz., what is the plaintiff's remedy, and what more must he prove to entitle himself to damages? These matters

are left to be dealt with by the judicial tribunals of the country; and they have nothing to guide them except the established principles applicable to actions for fraudulent misrepresentations.

Twycross v. *Grant* (1) decided that s. 38 of the Companies Act, 1867, could hardly apply to all contracts which fell within its words, but that the section certainly included all contracts by the persons named in the section which might be material to be known by applicants for shares. Lord Bramwell and Kelly C.B. thought that the words "any contract" ought to be still further restricted, but this opinion did not prevail. In *Twycross* v. *Grant* (1) the jury found as facts that the plaintiff took his shares on the faith of the statements of the prospectus, and that if the contracts there in question had been disclosed or referred to in the prospectus the plaintiff would not have taken the shares. They also found that the defendant bona fide believed that the contracts need not have been set forth. The jury found a verdict for the plaintiff, and gave him as damages the full amount he had paid for his shares, although he might have sold them at a premium before he brought this action. The case came before the Common Pleas Division and the Court of Appeal, and the verdict was upheld. The construction put on s. 38 in *Twycross* v. *Grant* (1) by the Common Pleas Division has, I believe, been accepted as sound ever since it was decided, viz., 1877; and on the question of damages, and also on the immateriality of the defendant's belief that s. 38 did not apply, the decision in *Twycross* v. *Grant* (1) was approved and followed by this House in *Shepheard* v. *Broome*. (2)

Twycross v. *Grant* (1) did not raise, and therefore did not settle, the very important question whether s. 38 does more than make non-disclosure equivalent to actual fraud in the cases to which the section applies. On proof of the non-disclosure of a contract required to be disclosed, the section declares that the prospectus is to be deemed fraudulent on the part of the persons named in the section. No evidence, therefore, of evil intention on their part is required to be given by the plaintiff, and on the other hand the section renders proof by them that they had no evil intention immaterial. But an action for damages based on fraud,

(1) (1877) 2 C. P. D. 469. (2) [1904] A. C. 343.

H. L. (E.) 1905 MACLEAY v. TAIT. Lord Lindley.

or on what is to be deemed fraudulent, can only be maintained by a person who can prove that the fraud, or what is to be deemed fraud, of which he complains, has caused him damage, and the question arises, how is this principle to be worked out when applied to actions based on s. 38? The section in terms gives no remedy or cause of action; but it is a remedial section for the protection of applicants for shares against the wiles of promoters and others. It is noteworthy that what is deemed to be fraudulent is the prospectus, and not merely the non-disclosure of a contract required to be referred to. The language of the section is consistent with the view that anyone who is induced to take shares by a prospectus which, although honest and true in all its statements, is to be deemed fraudulent, and who has lost his money by so doing, can maintain an action for damages, even although he was not in fact misled in any way whatever. He may have relied only on statements which were true, and the non-disclosed documents may be such that he would have attached no importance to them if he had known of them. The language of the statute is open to such a construction; but if so construed it leads to a result which is so unjust and so inconsistent with the principles which govern actions for damages occasioned by fraud, that some other interpretation consistent with the language of the section and with established principles ought to be sought for, and, if found, ought to be adopted.

The difficulty has been observed and commented upon in several cases. In *Sullivan* v. *Mitcalfe* (1), which arose on demurrer, Thesiger L.J. (2), after approving the decision in *Twycross* v. *Grant* (3) on s. 38, said that "no person can be said to have taken shares on the faith of a prospectus except a person who can prove to the satisfaction of a jury that he took his shares on the faith of there being no such contract as that omitted to be disclosed, and that if such contract had been disclosed to him he would not have taken his shares." Lord Bramwell adhered to the opinion which he had expressed in *Twycross* v. *Grant* (3), and on the construction of s. 38 did not agree with Thesiger L.J. (4) But, on principle, I think

(1) (1880) 5 C. P. D. 455.
(2) Ibid. 460.
(3) 2 C. P. D. 469.
(4) 5 C. P. D. 477.

Thesiger L.J. was right. Lord Blackburn, in his well-known judgment in *Smith* v. *Chadwick* (1), pointed out that a plaintiff who sues for damages by reason of having been induced by a fraudulent prospectus to take shares in a company must prove both fraud and damage to himself occasioned by such fraud. *Smith* v. *Chadwick* (1) did not turn on s. 38, but that section says no more than that a prospectus shall be deemed fraudulent against certain persons if it does not disclose certain documents. But proof that a document is fraudulent is not all that a plaintiff must prove in order to recover damages. He must further prove damage occasioned to himself by the fraud of which he complains. Proof that he applied for shares on the faith of a prospectus which is to be treated as fraudulent by s. 38, and that he obtained them and paid for them and lost his money, is prima facie evidence, but only prima facie evidence, of damage by fraud on himself. *McConnel* v. *Wright* (2) goes no further than this. But if the plaintiff is challenged on this point, he must go a step further and prove that he was misled by what makes the prospectus fraudulent, i.e., the omission to disclose some document which ought to have been disclosed. This was the view taken in *Nash* v. *Calthorpe* (3), which, in my opinion, was correct. It is noteworthy that Romer L.J. agreed with the decisions of the Court of Appeal in *McConnel* v. *Wright* (2), and also in the later case of *Nash* v. *Calthorpe* (3), which was not decided until after the cases before your Lordships came on for trial.

Another question which has been much discussed is the meaning of "knowingly issued" in the second part of s. 38. It is necessary to prove that the defendant knowingly issued the prospectus, and this has been held to mean issued the prospectus knowing of a contract such as is described in the section, and knowing that the prospectus did not disclose it. The fact that a defendant honestly but erroneously believed that the section did not apply to a particular contract of which he knew will not protect him from liability. This was decided in *Twycross* v. *Grant* (4), and by this House in *Shepheard* v. *Broome*. (5)

(1) (1884) 9 App. Cas. 195, 196.
(2) [1903] 1 Ch. 546.
(3) [1905] 2 Ch. 237.
(4) 2 C. P. D. 469.
(5) [1904] A. C. 342.

H. L. (E.) 1905 MACLEAY v. TAIT. Lord Lindley.

My Lords, the language of the statute in terms applies to directors and others who knowingly issue a prospectus which does not disclose such a contract as is mentioned in the first part of the section, whether they knew of its existence or not. But it can hardly be supposed that the Legislature meant to brand with fraud a director who knowingly issued a prospectus, but who never knew of the existence of a contract which ought to be disclosed. I cannot, however, think that the section can be properly restricted so as not to apply to a director who knew of a contract such as is described in the first part of the section, but who forgot all about it when he issued a prospectus not referring to it. Whether such a director could be properly convicted on an indictment for fraud, or for something short of it, is quite another question, which your Lordships have not to consider. I have already pointed out that no intent to deceive is necessary to support a civil action for damages based on s. 38. I will merely observe that in common parlance persons talk of knowing perfectly well what for the moment is not present to their mind, and even what they cannot at the moment recall to their memory.

With these observations on the construction and legal effect of s. 38, I pass to its application to the cases before your Lordships.

The Standard Company was promoted by the Globe Company, and the prospectus of the Standard Company stated that in the formation and issue of that company there were no promoters' profits in any shape or form whatever. This statement has been proved to be true. But there was a contract, dated October 27, 1898, and made between the Globe Company and the Standard Company, by which the Globe Company agreed to transfer to the Standard Company 5000 fully paid-up preferred shares of 1*l.* each in the Austin Friars Syndicate; and in consideration of this transfer the Standard Company was to allot and issue to the Globe Company 40,000 fully paid-up shares of 1*l.* each of the Standard Company. This agreement was unfortunately not disclosed in the prospectus of the Standard Company. But I cannot doubt for a moment that it fell within the first part of s. 38 of the Companies Act, 1867, and ought to have been

referred to in the prospectus. It was a contract which any prudent applicant for shares in the Standard Company would have desired to understand before he took shares in the Standard Company, and was, in that sense and to that extent, material, as explained in *Twycross* v. *Grant*. (1) Every judge who has had to consider this question has come to the same conclusion, and to my mind this part of the case is so clear that it is unnecessary to say more about it.

The prospectus was not issued until May, 1899; and the defendants were directors when it was issued, and when shares were allotted to persons who were induced by it to apply for shares in the Standard Company. All the plaintiffs in these actions did so apply. How it came about that the contract of October 27, 1898, was not disclosed is by no means clear; but whatever the real explanation may be, it was certainly not intentionally omitted by any of the defendants to these actions. It is clearly proved, and is now admitted, that whether legally liable or not, they are all innocent of any fraudulent misstatement or concealment. Nevertheless s. 38 entitles the plaintiffs to have the prospectus treated as fraudulent, and the next question is, have the plaintiffs or any of them proved that they have sustained any damage by reason of the non-disclosure of the contract of October 27, 1898? The plaintiffs took shares on the faith of the prospectus, and they have lost their money. This is their case; but it is at most only a prima facie case, and when the facts are more closely investigated it is difficult to believe that a knowledge of the deed of October 27, 1898, would have induced any of them to abstain from applying for shares. In the first place the examination and cross-examination of the plaintiffs shew conclusively that the plaintiffs paid no attention whatever to the documents which were disclosed, and if another had been added to their number the result would have been the same. But, further, the contract of October 27, 1898, when understood, turns out to be an ingenious but perfectly honest transaction, entered into in order to facilitate the acquisition by the Standard Company of the preferred shares of the Finance Syndicate, all the shares of which the Standard Company was formed to

(1) 2 C. P. D. 469.

H. L. (E.) 1905

MACLEAY v. TAIT.

Lord Lindley.

acquire. The contract conferred no profit whatever on the Globe Company, and so far from disproving the statement in the prospectus that there were no promoters' profits, the contract shews that none were or could be made out of the transaction to which the contract related. In short, it is, in my opinion, plain that the non-disclosure of this contract has not caused any damage whatever to the plaintiffs or any of them.

But, my Lords, even if I am wrong in coming to this conclusion, I am of opinion that the defendants are entitled to be protected by the plaintiffs' agreements to waive any fuller compliance with s. 38 than is contained in the prospectus. This is a case in which all the defendants are honest men. If they are liable, they are so by reason of an unfortunate mistake on their part. None of them had the slightest intention to keep back anything. Whether the same can be said of all the other directors I do not know. In most of the cases in which the effect of a waiver clause has been discussed, the clause has been unsuccessfully relied upon as a protection against trickery; but in the first of these, *Greenwood* v. *Leather Shod Wheel Co.* (1), it was pointed out that although such clauses were worthless for such purposes, yet they might prove useful to protect honest men from unjust demands. These actions are instances in which the defendants can justly claim the protection of the waiver clauses contained in the prospectus and application for shares.

For these reasons I have come to the conclusion that both appeals should be allowed, and the actions be dismissed with costs both here and below.

Judgment of Kekewich J. and order of the Court of Appeal reversed with costs here and below; cause remitted to the Chancery Division.

Lords' Journals, December 15, 1905.

Solicitors: *Gilbert Robins; Richardson & Co.*

(1) [1900] 1 Ch. 421.

[HOUSE OF LORDS.]

BRITISH EQUITABLE ASSURANCE COMPANY, LIMITED . . . . . } APPELLANTS;

AND

BAILY . . . . . RESPONDENT.

H. L. (E.) 1905 *Dec.* 15.

Company—Life Assurance Company—Mutual Assurance—Policy-holder participating in Profits—Alteration of Regulations—Power of Company to alter Rights of Policy-holder.

The respondent became a policy-holder in the participating branch of an assurance company upon the terms that he would abide by the deed of settlement, by-laws, and regulations of the company. After distributing the profits arising from that branch among the participating policy-holders for many years without deduction for a reserve fund the company proposed to alter that practice by devoting part of the profits to a reserve fund, and to alter the by-laws accordingly. By the deed of settlement the company had power to make alterations in the by-laws. The policy-holder having brought an action for an injunction against the company on the ground that he had taken his policy upon the faith of a prospectus which stated the practice:—

Held, that there was no contract between the company and the policy-holder not to alter their practice in the distribution of profits, and that the action could not be maintained.

The decision of the Court of Appeal, [1904] 1 Ch. 374, reversed.

THE material facts of this case are stated fully in the report of the decision of the Court of Appeal, and concisely in the judgment of Lord Macnaghten.

Nov. 28. *Levett*, *K.C.*, and *Whinney*, for the appellants, contended that the only contract between the company and the respondent was to be found in the policy, and was to conform to and abide by the deed of settlement and the by-laws, and that by the deed the company was expressly authorized to alter by a by-law any provision of the deed or any by-law.

P. O. Lawrence, *K.C.*, and *Gatey*, for the respondent, contended that the statements in the prospectus, forms, and other documents constituted a material representation by the company and a contract; that the proposed alteration was a breach of the

H. L. (E.) 1905

BRITISH EQUITABLE ASSURANCE COMPANY, LIMITED v. BAILY.

contract; and that the company had no power to make the alteration in the practice or the by-laws.

The cases cited in the Court below were referred to.

The House took time for consideration.

Dec. 15. LORD MACNAGHTEN. My Lords, this case raises a question between an insurance company and the holders of participating life policies in the company's office.

At the suit of a plaintiff suing in a representative character, Kekewich J. declared that the company ought to continue to distribute the entire profits arising from the participating branch of its business, after making certain deductions (which it is not necessary to specify), among the holders of participating policies.

The Court of Appeal has affirmed that order. The judgment of the Court was delivered by Cozens-Hardy L.J. The ground of the decision is to be found expressed in a single sentence: "A company cannot by altering its articles justify a breach of contract." No one, I should think, would be inclined to dispute the proposition thus asserted; but with all deference that is not the question. The simple question is what was the contract between the parties.

The distribution of profits in this company is governed by a by-law duly passed in accordance with the provisions of its deed of settlement made in 1854 when the company was completely registered under the Act then in force. The deed of settlement contains a clear and distinct provision empowering an extraordinary general meeting to make by-laws for the government of the company, subject to a proviso that such by-laws shall not be valid until confirmed by a subsequent extraordinary meeting. It was under this article that the by-law relating to the allocation of profits in favour of participating policy-holders was made. There is a subsequent article declaring that "the provisions of the deed of settlement and any by-law of the company may be altered, repealed, or suspended by a by-law or by-laws, but not otherwise."

The plaintiff's proposal for insurance was made on a printed

form, in which the proposer expressly agrees to "conform to and abide by the deed of settlement and by-laws, rules and regulations of the company in all respects." The proposal was accepted. A policy which refers to the proposal was executed. It provides for the payment of the sum assured, and "all such other sums, if any, as the company by their directors may have ordered to be added to such amount by way of bonus or otherwise, according to their practice for the time being." The conditions indorsed on the policy provide that the corporate funds, property, and effects of the company as mentioned in the policy, after satisfying all prior claims and charges "according to the provisions of the deed of settlement and the by-laws of the company for the time being," shall alone be liable for the payment of the moneys payable under the policy.

If there were nothing more, it would be absurd to suggest a doubt as to the right of the company to alter its by-laws in accordance with the provisions of the deed of settlement, however long the practice of the company as to the application of profits might have continued undisturbed.

It appears, however, that this company, like other insurance companies, has been in the habit of publishing a series of tables applicable to policies issued by the office. As usual, those tables are prefaced by a prospectus enlarging on the peculiar and extraordinary advantages offered.

Now the prospectus under the head of "Mutual Life Assurance Department" points out objections to ordinary mutual societies —objections, as it seems to me, mainly, if not entirely, applicable to such societies at starting. It then states that in the British Equitable Assurance Company (which is not a mutual office, any more than any other proprietary office which grants participating policies) these defects are avoided. Then follows this statement, "The current expenses of working the company are assessed rateably on the premiums received in the mutual life assurance department"—that is the participating department— "and the general premiums; and the entire profits made by the company in the mutual department, after deducting the expenses, are divided among the policy-holders without any deduction for a reserve fund."

H. L. (E.) 1905

BRITISH EQUITABLE ASSURANCE COMPANY, LIMITED v. BAILY.

Lord Macnaghten.

It was alleged on behalf of the plaintiff, and admitted by the company, that the plaintiff insured in the company in reliance upon the statement contained in the prospectus, and was induced thereby to apply to the company for the grant of the policy in question and "accepted such policy on the faith thereof, and would not have done so in the absence of such statement." It is not clear to my mind what is meant by this allegation and admission. Probably it means no more than this: that the plaintiff was attracted to this particular office by its prospectus. Now the statement in the prospectus was an accurate statement of the position of affairs at the time when the prospectus was brought to the notice of the plaintiff. It will be observed that the prospectus does not purport to give an assurance of any sort that the allocation of profits would never be altered, or to indicate that the system then in use and the practice existing at the time were essential features or fundamental conditions of the constitution of the company. Nobody, I should imagine, would effect an insurance in the belief that the laws and regulations of the office which he selects are immutable. What an insurer relies upon is the character and reputation of the company, and the certainty that no office which hopes to keep its business would think of altering the distribution of its profits to the prejudice of its policy-holders. Such a step would ruin the most flourishing company. It would simply be suicide.

I am at a loss to understand how the Court of Appeal came to the conclusion that the statements in this prospectus constituted a collateral contract, or are to be treated as incorporated in the contract of insurance, limiting the powers of the company in the full and free exercise of which the plaintiff bound himself to acquiesce.

I have not troubled your Lordships by referring to changes in the constitution of the company consequent upon the Act of 1862, or to the proposal now on foot to substitute a memorandum and articles of association for the company's deed of settlement and its by-laws. The question would, I think, be precisely the same if the proposal were to alter the by-laws of the company under the provisions of the deed of settlement.

I move your Lordships that the appeal should be allowed and the action dismissed with costs both here and below

LORD ROBERTSON. My Lords, the appellants are an assurance company, carrying on the business of assurance in its various departments. Among other branches of their business they issue life policies, the holders of which participate in the profits of the business. The respondent holds one of those policies. He is not a member of the company, and holds no relation to it other than that of a policy-holder. At the time when the respondent's policy was issued, viz., in 1886, the whole of the profits made in this branch, which is called the mutual and participating branch, were divided among the policy-holders in that branch. In 1903 the company proposed to make a change in the method of distributing the profits by taking out of the profits provision for a reserve fund, and distributing among the policy-holders the balance, instead of as formerly the whole, of those profits.

That this proposal was made in the interests of the company as an institution, and was matter of sound finance, is not in dispute. That it was competent to the company in terms of its constitution and regularly done is also not in dispute; and it is therefore unnecessary to state the various provisions in the deed of settlement and by-laws. The case of the respondent is that, standing as he does outside the company, his contractual rights as a policy-holder have been violated by the change. The order which he has sought and obtained is a declaration that the appellants ought to continue to distribute the entire profits arising from the mutual and participating branch.

Now the whole question in the case is, did the appellant company contract with the respondent to the effect of depriving themselves of the right (which they had under their constitution) to make this change? It seems to me not merely that they did not, but that, as part of the contract, the respondent bound himself to take only such profits as should be declared according to the rules of the company as they existed at each declaration of profits.

The policy itself, to which one naturally first looks for the contract, gives no countenance to the respondent's claim, and on the contrary limits his rights to the amount assured and "all such other sums, if any, as the said company by their directors

H. L. (E.) 1905

BRITISH EQUITABLE ASSURANCE COMPANY, LIMITED v. BAILY.

Lord Robertson

may have ordered to be added to such amount by way of bonus or otherwise, according to their practice for the time being." When we turn to the proposal, we find that the respondent signed a declaration that "I agree to conform to and abide by the deed of settlement and by-laws, rules and regulations of the company in all respects." The only express reference to profits contained in the proposal is in the eleventh question, "If in the mutual department, are any profits which may be declared to be appropriated by way of addition to the policy or reduction from the future premiums or making the policy payable during life-time?" (The answer was "by way of addition.") The third question is, "sum to be assured and for what term?" and the answer is, "400*l*., payable under Table A." Now Table A. is all figures, except the following words at the top: "Annual premiums to assure a sum of money at death, with profits in addition," and at the bottom "the entire profits divided triennially."

I have now stated everything bearing on the subject that is to be found in the policy, the proposal and the only document referred to in these instruments, viz., Table A. These seem to me to constitute the contract, and they negative the respondent's case and establish that of the appellants. But the Court of Appeal and the learned judge, whose judgment they affirm, have felt themselves entitled to decide the case, not on those documents, but on the prospectus which was shown to the respondent before he made his proposal. The theory of Kekewich J. was that there was a "collateral contract," while the learned Lords Justices justify the introduction of the prospectus on the somewhat singular ground that, inasmuch as Table A., which is referred to in the proposal, is to be found in the prospectus, therefore you are entitled to read the rest of the prospectus, relating to mutual policies, as part of the contract. I am unable to agree in this. We are not here in an action of damages or of rescission of the contract, and I do not feel entitled, when the respondent in his proposal refers to Table A., to hold him as incorporating all the rest, or part of the rest, of the print in which that table is to be found. The passages in the prospectus on which the Court of Appeal proceed contain a description of the system as de facto existing at the time. But it seems

to me that the respondent, so far from binding the appellant company to perpetuate that system, has placed himself in the hands of the company to the extent of binding himself to "abide by" (those are the words of the proposal) their rules. There is nothing repugnant or unreasonable in his thus following the fortunes of the company, and this is what he has done.

For these reasons I think that the judgments appealed against ought to be reversed.

LORD LINDLEY. My Lords, this appeal turns entirely on the contracts entered into between the insurance company and its participating policy-holders, represented by Mr. Baily. The contracts are contained in the policies issued to them. It is contended that the applications for these policies were based on the faith of prospectuses containing statements and holding out inducements which preclude the company from making alterations in the mode of applying their profits without the consent of the policy-holders. My Lords, if these gentlemen were seeking to rescind or rectify their contracts on the ground of fraud or mistake, or were suing for damages occasioned by fraudulent misrepresentation, it would be legitimate to refer to the statements in the prospectuses on the faith of which they became policy-holders. But the complaining policy-holders are not doing anything of the sort, and the prospectuses, not being referred to in the policies, cannot, in my opinion, be legitimately referred to in order to construe the contracts into which the policy-holders have been induced to enter. These contracts are to be found in the policies themselves. By each policy the company agree to pay to the executors of the assured a fixed sum out of the funds of the company, "and all such other sums, if any, as the said company by their directors may have ordered to be added to such amount by way of bonus or otherwise, according to their practice for the time being. Provided always, that this policy is made subject to the conditions and regulations hereon indorsed." That is the contract between the parties; but the indorsed conditions and regulations are part of it, and the fifth is important. The company was formed as long ago as 1854, and the object of the fifth regulation is to limit the liability of the

H. L. (E.) 1905

BRITISH EQUITABLE ASSURANCE COMPANY, LIMITED v. BAILY.

Lord Lindley.

members of the company. But the regulation throws light on the position of the policy-holders and on what they can claim under their policies. The fifth indorsed condition or regulation in effect provides that the funds of the company, "after satisfying prior claims and charges according to the provisions of the deed of settlement and by-laws of the company for the time being, shall alone be liable for the payment of the moneys payable under the policy, and that no shareholder, member, director, or other officer of the company shall be liable to any demand in respect of the policy beyond or otherwise than out of the payment in the manner and at the times provided for by the deed of settlement and the then by-laws of the company of the amount then remaining unpaid of the shares held by him." The reference to the deed of settlement and by-laws for the time being is all-important; for the by-laws determine how the profits of the company are to be disposed of, and those by-laws are subject to alteration from time to time by an extraordinary meeting of the shareholders of the company (see clauses 9, 24, 56 of the deed of settlement). The policy-holders are not shareholders, and have no voice in making or altering by-laws; but the sum payable under any policy, in addition to the fixed sum mentioned in it, is made by the policy itself to depend upon what the directors may have ordered to be added to such sum, and that depends upon their practice for the time being. The practice of the directors in its turn depends on how the profits are to be ascertained and divided in accordance with the by-laws, which may be altered from time to time, as above pointed out.

My Lords, I am quite unable to adopt the view taken by the Courts below as to the inability of the company to alter their by-laws as they have done, and, inter alia, to make a sinking fund without the consent of the policy-holders. I can find no contract to that effect. A collateral contract so wholly opposed to the contracts contained in the policies is not, in my opinion, established by the evidence in the case.

Of course, the powers of altering by-laws, like other powers, must be exercised bona fide, and having regard to the purposes for which they are created, and to the rights of persons affected by them. A by-law to the effect that no creditor or policy-holder

should be paid what was due to him would, in my opinion, be clearly void as an illegal excess of power. But in this case it is conceded that the alteration contemplated, and sought to be restrained, is fair, honest and business-like, and will, in the opinion of the directors and shareholders of the company, be beneficial as well to the policy-holders as to the shareholders. The sole question is whether such an alteration infringes the rights of the policy-holders. In my opinion it clearly does not.

I am of opinion that the appeal should be allowed, and that the action should be dismissed, and that the respondent should pay the costs of the action and of the appeals both here and below.

Judgment of Kekewich J. and order of the Court of Appeal reversed, and action dismissed.

Lords' Journals, December 15, 1905.

Solicitors for all parties: *Henry Gover & Son.*

[HOUSE OF LORDS.]

KIRBY . . . . . APPELLANT;

AND

HUNSLET UNION ASSESSMENT COMMITTEE . . . . . RESPONDENTS.

Poor Rate—Rating of Factory with Machinery—Machines used in connection with Hereditament, but remaining the Personal Property of the Tenant.

Tenants' machinery placed in a factory, and used therewith for the business of the factory, whether it be affixed to the freehold or not, may be taken into consideration so as to increase the amount in assessing the factory to the poor rate. The law and practice to this effect have been too long established to be now overruled.

THE facts were stated by the Recorder of Leeds in a special case.

1. The appellant occupies premises in the Hunslet Union as a jobbing engineer.

2. The premises consist of an office, a model room, a fitting shop, a machine shop, a store, an engine room, a shed, and a

H. L. (E.) 1905 KIRBY v. HUNSLET ASSESSMENT COMMITTEE.

yard; all of which, except the office, model room, and store, contain machinery. Some of the machinery, such as a horizontal steam engine, shafting pulleys, steam piping, &c., admittedly forms part of the freehold. In addition to the above there are a number of machines which form no part of the freehold, and which have been placed thereon by the tenant or his predecessor in title for the purpose of making, and which do make, the premises fit as premises for the particular purpose for which they are used. The general character of these machines is shewn in the schedule attached to this case, and it was admitted or proved to my satisfaction that, with one or two trifling exceptions, these machines were not affixed to the freehold but merely secured to the fixed shafting by belting in order to enable the machines to be worked by the tenant whose property they were. It was for the purposes of the argument admitted by counsel on both sides that the machinery set out in the schedule was tenant's machinery within the meaning of the Tyne Boiler case. (1)

3. In 1891 the appellant, who had been in occupation of the premises since 1878, entered into an agreement with the owner of the premises to take the premises on lease for a term of five years, from October 1, 1891, at a rent of 26*l.* per annum, the appellant covenanting to pay all rates and taxes, except landlord's property tax, and the lessor to keep the premises in good tenantable repair.

Since the expiration of the term the appellant has continued to occupy, and now occupies, the premises as a tenant from year to year upon terms similar to those contained in the agreement.

4. The appellant contended: (1.) That in valuing the premises the value of the user of the machinery other than that which forms part of the freehold ought not to be considered. (2.) That the machinery ought only to be taken into account in so far as its presence (*a*) affords proof that the premises are fit for the purpose of the business carried on therein, and (*b*) would be likely to induce a tenant to give a higher rent for the premises than he would give if the machinery were not upon the premises

(1) See next note, p. 46.

(3.) That to rate the premises upon the principle contended for by the respondents would be to put an assessment on machinery other than that which forms part of the freehold, which is wrong, because the said machinery is not part of the rateable hereditament. (4.) That machinery of the class to which the machines belong, if it were not upon the premises when a letting took place, would be brought and put upon the premises by the tenant to whom the premises were let and not by the landlord who let the premises, and that therefore it is wrong to include the value of the machinery in the annual rent which such tenant would pay to such landlord.

5. The respondents contended that in inquiring what was the gross estimated rental and the rateable value the basis of the problem was to ascertain what was the rent which a hypothetical tenant would give for the premises equipped with the scheduled machines, and including the right to the use of such machines, and that in ascertaining such rent the value of the user of the said machines must be taken into account as enhancing the rental value of the freehold. It was upon this principle that the rateable value appealed against had been assessed.

6. I held that in inquiring what was the gross estimated rental and the rateable value, the basis of the problem was to ascertain what was the rent which a hypothetical tenant would give for the engineering works as a combination of land, buildings and scheduled machines on a demise which included the right to use the scheduled machines; that is to say, on the assumption that the hypothetical tenant would get as part of the consideration for the hypothetical rent the right to use such machines upon the premises during his tenancy. And that in this way the scheduled machines were properly being taken into account as enhancing the rental and rateable value of the freehold. I also held that the value of the user of the machinery was not necessarily to be arrived at by taking the cost or value of the machinery and putting a percentage on such value, as had been done by the respondents' valuers.

The question for the opinion of the Court is whether I was right in law in my decision as stated in paragraph 6.

On the question of amount the recorder reduced the

H. L. (E.) 1905

KIRBY v. HUNSLET ASSESSMENT COMMITTEE.

assessment from 67*l.* to 46*l.* as the gross estimated rental, and from 45*l.* to 31*l.* as the rateable value.

This decision was affirmed by the King's Bench Division (Lord Alverstone C.J., Kennedy and Ridley JJ.), and on appeal by the Court of Appeal (Collins M.R., Romer and Mathew L.JJ.), who considered themselves bound by the Tyne Boiler case. Hence the present appeal.

Balfour Browne, K.C., and *W. C. Ryde*, for the appellant. The decisions below treat the machinery as if it were part of the freehold, which the case finds it is not. The Act of Elizabeth made lands and houses rateable, but not personal property, which this machinery is. By the Parochial Assessment Act, 1836, c. 96, s. 1, the assessment of hereditaments is regulated on the principle that the rateable value is the rent which might be expected to be given for the hereditament alone. Machinery affixed to the soil so as to become part of the freehold must be taken into account in assessing the rateable value, but no other machinery. A billiard room in a public-house must be taken into account; a sea view; a music room; a studio with a north light; but the billiard table, the piano, and the pictures must not be taken into consideration. Personal chattels are not rateable: see the Assessment Act of 1840. Imagine the Inner Temple assessed higher on account of the books inside. In the present case the assessment was based on the decision in *Tyne Boiler Works Co.* v. *Overseers of Long Benton* (1), where the Court of Appeal held that tenants' machinery which is personal property is to be taken into account as enhancing the value of the hereditament. But it is not said what is meant by "taking into account." The rent no doubt is raised by the presence of such machinery if the machinery belongs to the landlord, but not otherwise. Unfixed machinery which belongs to the tenant cannot enhance the rent. There is no power to rate the right to use machinery. The only way in which machinery belonging to the tenant as his personal property ought to be taken into consideration is as affording proof of the convenience of the building for the purpose of the business, and

(1) (1886) 18 Q. B. D. 81.

a possible value from the tenant being able to take it as it is without the trouble and expense of buying and bringing it on to the premises. If this were what is meant in the Tyne Boiler case that decision is right, but if it means that the rating is to be increased because the machinery is used the decision is wrong and should be overruled, with all the other cases that support it. [They discussed the cases cited in the Tyne Boiler case.]

Cripps, K.C., Scott Fox, K.C., and *W. J. Jeeves,* for the respondents, were not heard.

EARL OF HALSBURY. My Lords, I am of opinion that the judgment appealed against is perfectly right. Considerable difficulty has doubtless arisen through the confusing of two different things. The question of what is and what is not attached to the freehold is fraught with important consequences in our law; and undoubtedly if the statute had been always understood to refer simply to the rateable value of the four walls of the building and its roof, I could understand a great deal of the argument which has been suggested to us. It would have been, I should have thought, extremely difficult to arrive at the proper assessment of such things, because the business of human life is not conducted by putting an hypothesis of what a thing would fetch if it were occupied otherwise than as it is, and the problem which the overseers have to solve in arriving at the assessment is difficult enough, without putting the additional difficulty upon them, that they are to try and find out what a building would fetch in the shape of rent if it was different from what it is, or if it were used differently from what it is, or if it were furnished differently from what it is. It is enough, to my mind, to say that for a period of certainly more than half a century, erroneously according to the learned counsel who last addressed us, but undoubtedly in fact, judges of the greatest eminence have recognized the fact that although a particular set of machinery may, by reason of the peculiarity of the manufacture, or what not, be not affixed to the freehold so as to become part of the land, or hereditament, yet, if the thing is being so occupied, if the premises are being so employed, and the machinery in those premises is being so used as that it makes

H. L. (E.) 1905

KIRBY v. HUNSLET ASSESSMENT COMMITTEE.

Earl of Halsbury.

the factory appropriate to the particular industry carried on therein, the machinery itself is not to be disregarded in assessing the value of that thing occupied as it is, and used as it is, with the accommodation and furniture which is necessary for it to carry on the manufacture that is there being conducted.

My Lords, if that is so, it seems to me we have nothing to do with the idea which prevailed in the mind of the learned counsel —to speculate upon what particular sort of contracts of tenancy would be likely to be made between the landlord and the tenant, still less with what contracts are actually made between the landlord and the tenant. The overseer has a comparatively simple problem to solve, although it is difficult enough sometimes; he sees the place being conducted as a brewery, or an iron foundry, or what not; he looks at the premises, he looks at the furniture which is necessary for carrying on the business as a brewery or foundry; he does not in his own mind analyze, and to my mind he ought not to analyze, what would be likely to be the initial arrangements between the intended brewer and the owner of the freehold, to see who should provide this or that engine, or what not, but he looks at the premises as they are, as they are being occupied, and as they are being used, and he says to himself, "Well, looking at the whole of the place, such and such is the rent which would probably be paid by a tenant from year to year for such an establishment as this." And in that he does not and ought not to strip the whole of the place of everything but the four walls which contain the whole system of manufacture therein contained, and simply value either the ground upon which the building is placed, or the four walls and roof which are the containing elements of all the manufacture that goes on in it.

It seems to me that the difficulty which would be imposed upon the overseer would be insurmountable if he were called upon to say: "Well now, before I can value the hereditament used as it is, I must make an inquiry and see how much the landlord has agreed to do, and how much the tenant is going to do." I do not know that you could limit that system of assessment even to the question of machinery. You might have to go into a great variety of other things and find

out what accommodation was provided otherwise by the landlord for this, that and the other. If that was so, I think the Parochial Assessment Act would become a dead letter, and you would have a fanciful arrangement of assessment according to the particular fancy of each overseer, as to what the landlord ought or ought not to do, or what the tenant ought or ought not to insist upon, which, to my mind, would certainly be the reverse of doing that which the Parochial Assessment Act was supposed to have done, namely, to simplify the duties of the overseer.

My Lords, I decline myself to enter into what I may call the original equities which might have guided this matter. It is enough for me that a long series of decisions, for certainly half a century, have established the bald proposition, which is all I am insisting upon, namely, that although the machinery may not be part of the freehold, it yet is to be taken into account, and in saying that, I do not want to muffle it in a phrase, but what I mean by that is, that to increase the amount of the rate which is exacted from the tenant you may enter into that question and form a judgment upon it, although, as a matter of fact, the machinery may not be attached to the freehold. That is all I mean to decide in this case; and I believe that is enough for the decision of this case.

My Lords, I think the new point which has arisen now—the question having been debated very considerably in a great number of parishes in this country—and which has never been raised before, namely, that you must first ascertain how much the tenant is going to get from his landlord, before you can arrive at the assessment, may be dismissed as undoubtedly being necessarily involved in the decisions which have been come to before now, and necessarily disregarded. To my mind, therefore, the whole question is reduced to a very simple one: Can you, or can you not enhance to any extent the amount of the assessment which you make upon buildings in which there is machinery adapted for the purpose of the manufacture, where the manufacture is carried on in them, although the machines do not, as a matter of actual fact, form part of the freehold of the premises? I am of opinion that after the long line of decisions which have

H. L. (E.) 1905

KIRBY v. HUNSLET ASSESSMENT COMMITTEE.

Earl of Halsbury.

been arrived at, you can do so. Under these circumstances it appears to me that this appeal ought to be dismissed with costs.

LORD MACNAGHTEN. My Lords, I entirely agree. I should only like to remind your Lordships of what was said by Lord Campbell in the case of *Reg.* v. *Southampton Dock Co.* (1), After a passage which has already been read to your Lordships, which was, in fact, a repetition of what was laid down in *Rex* v. *Birmingham and Staffordshire Gas Light Co.* (2) and *Reg.* v. *Guest* (3), his Lordship goes on to say: "In this last case" (*Reg.* v. *Guest* (3)) "all the arguments pressed upon us to shew that such fixtures are stock-in-trade and not to be taken into account in a rate on the realty, were urged, but urged in vain. It is of the greatest importance that a rule upon such a subject, which has been laid down and acted upon, should be adhered to; and we see no reason why this rule should be now disturbed." The point was settled more than fifty years ago. There is nothing new as it seems to me in the arguments we have heard to-day.

LORD ROBERTSON. My Lords, I entirely agree.

Order of the Court of Appeal affirmed and appeal dismissed with costs.

Lords' Journals, December 18, 1905.

Solicitors: *Vincent & Vincent, for Day & Yewdall, Leeds; Pitman & Sons, for Elmsley, Son & Smith, Leeds.*

(1) (1881) 14 Q. B. D. 587. (2) (1837) 6 A. & E. 634.
(3) (1838) 7 A. & E. 951.

[HOUSE OF LORDS.]

EVAN C. SUTHERLAND . . . . . APPELLANT; H. L. (Sc.) 1905 Dec. 4.

AND

S. C. THOMSON (MANAGER OF THE STANDARD LIFE ASSURANCE COMPANY) AND OTHERS . . RESPONDENTS.

SECOND APPEAL.

Heritage—Right in Security—Messenger-at-Arms—Heritable Securities (Scotland) Act, 1894 (57 & 58 *Vict. c.* 44), *ss.* 8, 10.—*Scottish Law.*

By the Heritable Securities (Scotland) Act, 1894, s. 8, any creditor who has exposed for sale under his security the lands held in security . . . . may apply to the sheriff for decree in the terms of Sched. D thereto annexed, and the sheriff may "after service on the proprietor and on the other creditors, if any, and after such intimation and inquiry as he may think fit, grant such application and issue decree in the said terms. On such decree being pronounced and an extract thereof in which said lands shall be described at length or by reference recorded in the appropriate register of sasines, the right of redemption reserved to the debtor shall be extinguished, and the creditor shall have right to the lands disponed in security in the same manner and to the same effect as if the disposition in security had been an irredeemable disposition as from the date of such decree." By s. 10 "no purchaser from the creditor or other successor in title in the lands shall be under any duty to inquire into the regularity of the proceedings under which such creditor has acquired right to the lands held under his security by virtue of the provisions contained herein, or be affected by any irregularity therein, without prejudice to any competent claim of damages against such creditor."

In 1895 certain creditors presented a petition under s. 8 of the above Act. The appellant, the proprietor of the lands, did not appear. The sheriff granted decree. Thereafter the creditors sold the lands and granted dispositions in favour of the purchasers.

In 1901 the original proprietor brought an action against the creditors and purchasers for reduction of the citation and execution of service upon him of the petition in the sheriff Court, alleging that the service had been executed by a messenger-at-arms, who was not an officer of the sheriff Court; and he pleaded that such service, with all that had followed thereon, including the disposition to the purchasers, was null and ineffectual:—

Held, affirming the decision of the Second Division of the Court of Session, that, assuming the service to be as stated, the error was an

H. L. (Sc.)
1905
SUTHERLAND
v.
THOMSON.

"irregularity in the proceedings" within the meaning of s. 10 of the Heritable Securities (Scotland) Act, 1894, and consequently that the right of the purchasers was not affected thereby.

APPEAL from the Second Division of the Court of Session, Scotland. (1) In 1876 E. C. Sutherland, of Skibo, Sutherlandshire, and of Aberarder, Inverness-shire, the appellant, granted various bonds and dispositions in security over these estates. One of these bonds was granted in favour of the Standard Life Assurance Company and the others were acquired by the Royal Bank of Scotland. In July, 1895, the estates of Skibo and Aberarder were exposed for sale by auction under conditions signed by the Standard Life Assurance Company and the Royal Bank of Scotland as heritable creditors. The estate failed to be sold. Thereafter on August 15, 1895, a petition was presented in the sheriff Court at Dornoch, under the Heritable Securities (Scotland) Act, 1894, s. 8, by the Standard Life Assurance Company and the Royal Bank of Scotland against the appellant and certain other persons praying for decree that the appellant had forfeited the right of redemption reserved for him in the above-mentioned bonds and disposition in security: that the same were extinguished at the date of the decree to follow thereon: and that the petitioners had right to and were vested in the lands of Skibo and Aberarder, described in the bonds, as absolute proprietors thereof; but subject always to the burdens and conditions contained in the bonds. Neither the appellant nor any other person called as defenders appeared.

In October, 1895, the sheriff substitute granted decree in terms of the prayer of the petition. In November, 1898, the Standard Life Assurance Company and the Bank, who had possessed the estates under the title of 1895, sold the estate of Skibo to Mr. and Mrs. Andrew Carnegie, of Pittsburg, U.S.A., and the disposition was duly recorded. In 1900 the Standard Life Assurance Company and the Bank sold the estate of Aberarder to Mr. Beckwith Smith, of London, and this disposition was also duly recorded.

In 1901 the appellant raised this action against the Standard Life Insurance Company, the Royal Bank of Scotland, Mr. and Mrs. Carnegie, and Mr. Beckwith Smith, concluding for reduction

(1) (1892) 4 F. 957.

of (1.) the citation and execution of service upon the appellant of the petition in the sheriff Court at Dornoch; (2.) The sheriff substitute's decree; and (3.) and (4.) the dispositions in favour of Mr. and Mrs. Carnegie and Mr. Beckwith Smith respectively. The appellant averred (cond. 11) warrant to cite the respondents (appellant and others) in said petition was granted by the sheriff on August 16, 1895. On August 19, 1895, a copy of the said petition, having indorsed upon it a copy of the said warrant and a pretended schedule of citation bearing to be signed by a man named Macdonald, was left for the pursuer (appellant) at the house of the pursuer's wife, who was also called as a respondent in the said action. A pretended execution of the said citation was made by the said Macdonald. Macdonald was not at the time he made the said pretended service on the pursuer and his wife an officer of the Sheriff Court of Ross, Cromarty and Sutherland, and was not a person qualified to serve the petition. The respondents admitted in their answer that Macdonald was not a sheriff officer; but they explained that he was a messenger-at-arms, and as such was entitled to serve the petition. The appellant contended that Macdonald as a messenger-at-arms was not entrusted with sheriff's authority to serve the petition, and that therefore the execution of the service was illegal and inept.

On December 31, 1901, the Lord Ordinary (Lord Kincairney) assoilzied the defenders from the conclusions of the summons; and on July 3, 1902, the Second Division adhered.

Dec. 4. *Ure, K.C.*, and *J. A. Kemp* (the first of the Scottish Bar), for the appellant. The sheriff had no power to grant the application, as there had been no proper service on the appellant, proprietor of the lands. A messenger-at-arms as such is not an officer of the sheriff; he holds his commission from the Lord Lyon King of Arms: Bank. 4, 6, 17. A warrant to serve by a sheriff addressed to officers of Court necessarily means officers of the sheriff, and these only. Writs relating to civil proceedings in the Sheriff Court must be served by a sheriff officer: Small Debts (Scotland) Act, 1837 (1 Vict. c. 41); Debts Recovery Act, 1867 (30 & 31 Vict. c. 96), s. 3; Sheriff Courts Act, 1838 (1 & 2 Vict. c. 119), ss. 23, 25; Sheriff Courts Act, 1853 (16 & 17 Vict. c. 80).

H. L. (Sc.) 1905

SUTHERLAND v. THOMSON.

Service by a messenger-at-arms, who was not an officer of the sheriff, was therefore inept unless the messenger had special commission to serve for the sheriff, and the respondents admit that Macdonald had not this special commission. Further, the case here was one of fundamental nullity, and not a mere irregularity; and it therefore did not fall under s. 10 of the Heritable Securities (Scotland) Act, 1894. Secondly, the exposure of sale omitted 400 acres included in the security, which might have made a great difference in the sale.

[EARL OF HALSBURY L.C. It appears this point was not argued in the Court below, and you did not ask for a proof.]

[They cited *Hamilton* v. *Bayne* (1); *Finlayson* v. *Innes* (2); *Cheyne* v. *M'Gungle* (3); *Cumming* v. *Munro* (4); *McMillan* v. *Campbell* (5); *Harvey* v. *Forrest.* (6)]

J. Avon Clyde, S.-G. for Scotland, and *Thomas Shaw, K.C.* (of the Scottish Bar), for the respondents, were not called upon.

EARL OF HALSBURY L.C. My Lords, it seems to me that the judgment of the Court below is perfectly right. Assuming what does not appear to be quite satisfactorily established, that the regular course would have been that this writ should have been served by a sheriff officer, not by a messenger-at-arms, that is an irregularity strictly within the meaning of the 10th section of the Act of Parliament, and therefore, whatever question there may be about the regularity of the officer, it does not affect the validity of what was done. It is very obvious that if an irregularity of that sort could set aside the whole proceedings, it would be impossible for a person to buy with any sense of security; it was obviously with the intention of preventing such questions arising afterwards that the 10th section was passed. Even if the facts supplied material for arguing the question, I cannot entertain a doubt that it is an irregularity covered by the Act, and does not render the proceedings null and void.

(1) (1857) 1 Guthrie's Sh. Ct. Cases, 405.
(2) (1803) 4 Pat. App. 443.
(3) (1860) 22 D. 1490
(4) (1833) 12 S. 61.
(5) (1832) 10 S. 220.
(6) (1841) 4 D. 97; (1845) 4 Bell's App. 197, 211.

The procedure was right. The writ was served on the right person, who had an opportunity of making a defence if he had thought proper, but, according to the learned counsel, he took upon himself to say: "This writ has been served by the wrong person; I shall not attend to it at all." There is no doubt that the service was an irregularity which the 10th section covers.

My Lords, I should have felt more difficulty about the other point if it had been raised in the Court below. I do not in the least mean to say that it is an absolute objection against a good point, if it is a good point, to say that it has not been raised in the Court below, because this House ought to make such an order as ought to have been made originally. But the peculiarity of this case is that this is a question which could only have been settled by proof, and we are asked to overrule the judgment of the Court of Session by a suggestion on which, if it was well founded, the Court might have been asked to reverse the proceedings before the Lord Ordinary and to order a proof. It is not merely a question of a point which is a good point, and remains a good point not being argued, but here something was to be done. If the objection was a good one, what the parties complaining ought to have done was to have put it before the Court of Session and asked the Court to do that which ought to have been done by the Lord Ordinary, namely, to allow a proof. The appellant never did ask that—the question never has been raised; and I think now it is impossible for him to ask us to do that and overrule the Court of Session in not doing that which that Court was never asked to do. My judgment certainly proceeds upon the theory that the parties have abandoned that part of their complaint. The appellant ought to have asked for it in the Court below, and if then it had been refused we could have entertained the question. At present it appears to me that he is put out of Court by the course he has pursued, and I move your Lordships that the appeal be dismissed with costs.

Lord Macnaghten. My Lords, I am of the same opinion.

Lord Robertson. My Lords, I entirely agree.

H. L. (Sc.) 1905 SUTHERLAND v. THOMSON.

LORD LINDLEY. My Lords, I have nothing to add. It seems to me that the judgment is obviously right.

Ordered that the appeal be dismissed with costs.

Lords' Journals, December 4, 1905.

Agents for appellant: *A. & W. Beveridge.*

Agents for respondents: *R. S. Taylor, Son & Humbert, for Dundas & Wilson, C.S., Edinburgh.*

H. L. (Sc.) 1905 *Dec.* 14.

[HOUSE OF LORDS.]

MARCHIONESS OF HUNTLY AND ANOTHER. APPELLANTS;

AND

GASKELL AND OTHERS . . . . . RESPONDENTS.

Domicil—Acquisition of Domicil—Intention—Legitim—Scottish Law.

The abandonment or change of a domicil is a proceeding of a very serious nature, and an intention to make such an abandonment must be proved by satisfactory evidence.

A person having a domicil of origin in England does not lose it and acquire a Scottish domicil by making his home in Scotland for many years, unless in the circumstances his doing so clearly shews his intention to abandon his original domicil.

The testator, whose domicil of origin was in England, had his chief residence or home in Scotland for thirty years prior to his death. During this time he retained his interests in England as principal partner in a private bank at Manchester, and as proprietor of large landed estates, and continued his occupancy as tenant of a mansion house near Manchester and of a house in London. He left very large personal estate and a will in English form, made a short time before his death, in which he was designated as of Manchester. He also made a will in Scottish form. Apart from making his home in Scotland there was nothing in his conduct to suggest any intention of abandoning his English domicil:—

Held, affirming the decision of the First Division of the Court of Session, that he had not lost his English domicil.

APPEAL from the First Division of the Court of Session, Scotland. (1)

(1) (1902) see *Brooks* v. *Brooks' Trustees*, 4 F. 1014. This case raised the same point as to domicil, but was a claim by the widow, Lady Brooks, for jus relictæ, and was heard first in the Court of Session.

The appellant, the Marchioness of Huntly (who sued with the consent of her husband, the Marquis of Huntly), was the eldest daughter of the late Sir William Cunliffe Brooks, Baronet. The respondents, Captain H. B. Gaskell and others, were the trustees and executors of Sir William Cunliffe Brooks, acting under a trust disposition and settlement executed by Sir William, April 26, 1900, and a will dated the same day. The appellant contended that her father, the testator, had abandoned his English domicil and was at the date of his death a domiciled Scotsman, and she claimed legitim. The Lord Ordinary and the First Division of the Court of Session were unanimously of opinion that Sir William Cunliffe Brooks had not abandoned his English domicil, and that consequently the appellant was not entitled to legitim.

The material facts were given as follows by the Lord Ordinary (Lord Low).

"Sir William Cunliffe Brooks was born in 1819 in Blackburn, Lancashire, where his father carried on the business of banker. He was educated in England, and in 1842 graduated at Cambridge, and soon afterwards he married his first wife, who was an English lady. He was called to the English Bar in 1847, but in the same year he became a partner with his father in the banking business, the chief office of which by that time had been transferred to Manchester. He then took a lease of Barlow Hall, which is situated a short distance from Manchester, and which was his residence so long as he continued to take an active part in the business of the bank.

"Sir William's father died in 1864, and he then became sole partner of the bank. In 1864, also, he purchased premises in Lombard Street, London, and established a branch of his bank there. The head office, however, continued to be in Manchester. In 1865 his wife died, and in 1869 he was elected Member of Parliament for the Macclesfield Division of Cheshire, and took a lease of the house, No. 5, Grosvenor Square, London. In the same year he gave up the personal management of the bank, but continued to carry on the business through the agency of managers until the year 1888, when he assumed his nephews, Samuel Burd Brooks and John Brooks Close Brooks, as partners.

H. L. (Sc.) 1905

HUNTLY (MARCHIONESS) v. GASKELL.

These gentlemen took the surname of Brooks, by Sir William's desire, when they were assumed as partners. By the contract of co-partnery, Sir William was entitled to put an end to the partnership at any time—'Such dissolution to take effect on the day of the date of notice.' Sir William's share of the capital of the bank was 300,000*l.*, the shares of his partners being 30,000*l.* and 25,000*l.* respectively. Sir William's share of the profit was fixed at eight-tenths, each of his partners receiving one-tenth. According to a statement which was produced, Sir William during his life derived an income from the bank, including interest on capital of (in round numbers) from 30,000*l.* to 50,000*l.* a year. Although after the year 1869 Sir William ceased to take an active part in the banking business, he continued throughout his life to be in daily, or almost daily, communication with the head office, and he appears to have kept himself informed as to the general course of the business, and to have exercised a general supervision.

"Sir William also succeeded his father in large landed estates in Lancashire and Cheshire, the rental of which latterly exceeded 20,000*l.* a year. There was no mansion house on these estates, but a considerable part of them was in the vicinity of Barlow Hall. I may here mention that Barlow Hall is a commodious residence (apparently an old mansion house), built in a picturesque style of architecture, and surrounded by attractive grounds.

"Sir William appears to have first made his acquaintance with the highlands of Scotland some time in the sixties, when he visited his friend, the witness, Mr. Sidebottom, who had a deer forest in the Blackmount district. Sir William subsequently took Drummond Castle, and in 1869 he went to Glen Tana on Deeside. The chief reason, in the first instance, for the selection of Glen Tana by Sir William as a highland residence, appears to have been that it was near Aboyne Castle, the seat of the Marquis of Huntly, who had married his elder daughter. Glen Tana was also then the property of the Marquis of Huntly.

"When Sir William first went to Glen Tana a lease for a limited period seems to have been prepared, but was not executed. In 1871, however, the Marquis of Huntly granted to Sir William a

lease for twenty years, or for Sir William's life, or for his own life. Sir William had desired to have a lease for his life, but the fact that the estate was entailed was thought to create a difficulty, and accordingly a lease in the terms which I have mentioned was adopted.

"In 1872 Sir William either built, or converted a cottage at Glen Tana into, a private chapel, which was consecrated for Divine service according to the rites of the Episcopalian Church. It was called the Church of St. Lesmo.

"In 1874 Sir William's second daughter was married to Lord Francis Cecil, and in 1879 he himself married Miss Davidson, daughter of Lieutenant-Colonel Sir David Davidson, K.C.B., a Scottish gentleman who resided near Edinburgh. The marriage settlement was in the English form, and was prepared by Mr. Wood, Sir William's solicitor in Manchester. The settlement narrates that Sir William had paid to certain persons as trustees the sum of 50,000*l*. The purposes of the trust (after certain directions as to the disposal of the income during the joint lives of the spouses) were to pay the income of the trust fund to Lady Brooks during her life in the event of her surviving her husband, and to hold the capital for the children of the marriage, whom failing (the event which happened), for Sir William, his executors, administrators, or assigns absolutely. The trustees were three English gentlemen nominated by Sir William. The marriage took place, by Sir William's express desire, in the Chapel of St. Lesmo. In the register Sir William's 'usual residence' is entered as '5, Grosvenor Square, London.'

"In 1885 Sir William lost his seat for the Macclesfield Division of Cheshire, but in the following year he was elected unopposed for the Altrincham Division of the county—a constituency which he continued to represent until 1892, when he retired from Parliament. In the same year (1886) a baronetcy was conferred upon him. The patent was in favour of 'William Cunliffe Brooks of the city of Manchester.'

"In 1888 Sir William purchased Aboyne Castle. In 1891 he purchased Glen Tana, and in 1899 the estate of Ferrar. I do not think that I put it too strongly when I say that Sir William would have preferred not to make these purchases, but that he

H. L. (Sc.) 1905

HUNTLY (MARCHIONESS) v. GASKELL.

was compelled, or, at all events, induced by circumstances, to do so. The Marquis of Huntly appears to have fallen into grave financial embarrassment, and Sir William purchased Aboyne to save his daughter's residence from her husband's creditors. The amount of land which he acquired along with Aboyne Castle was comparatively small, so that the castle was much too large a mansion house for the estate. Therefore when the adjoining lands of Ferrar came into the market, it seems to have been a prudent thing to do, and commercially a sound transaction, for Sir William to buy the lands and add them to the Aboyne estate.

"In regard to Glen Tana, Sir William would have preferred to have remained the tenant of the Marquis of Huntly, but when it became necessary that the estate should be sold for payment of debt, Sir William purchased it because he did not choose that anyone else should be his landlord. His own expression was that he purchased Glen Tana with 'a knife at his throat.'

"From 1869 onwards Sir William's principal residence was Glen Tana. He always resided some part of the year at Grosvenor Square and Barlow Hall, but his residence at these houses was, generally speaking, confined to what was necessary for the performance of his parliamentary or other duties and the transaction of business. During the six years from 1894 to 1899 both inclusive (these being the last six complete years of his life), his average residence at Barlow Hall was thirteen days, at Grosvenor Square forty-one days, and at Glen Tana two hundred and sixty-seven days. In 1900, down to June 9, when he died, he had resided sixty-three days at Barlow Hall, twenty-four days at Grosvenor Square, and seventy-three days at Glen Tana. During his residence at Barlow Hall in that year he was engaged in having his final testamentary settlements prepared. I may mention that Sir William also occasionally spent some time during the winter at Antibes in the South of France, but I do not think that his visits there have any bearing upon the question at issue.

"Sir William kept his domestic establishment at Glen Tana, and he built houses there for the families of some of his servants who were married. When he went to Grosvenor Square or Barlow Hall he took such servants with him as he considered to

be necessary for the occasion. The house in Grosvenor Square was looked after in his absence by a housekeeper who had two housemaids under her. He had also certain carriages which always remained in London. Barlow Hall was also in charge of a housekeeper and housemaids, and there was always a sufficient staff of gardeners there to keep the place in order. The instructions to the housekeepers at Grosvenor Square and at Barlow Hall were to have the houses ready for occupation upon a day's notice.

"Sir William became extremely attached to Glen Tana. He spent enormous sums of money upon, or in connection with, the estate; and, especially in latter years when he was not so able to indulge in field sports as formerly, the planning and superintending the construction of the various roads which he made, and buildings which he erected, seems to have been the chief pleasure of his life.

"Sir William had an account with a bank in Aboyne, but that seems only to have been used for local purposes such as the payment of the accounts of local tradesmen, and certain payments in connection with the Glen Tana estate. All other payments, including the wages of his servants, were made by cheques upon Manchester.

"Sir William died on June 9, 1900. He left instructions in his will that if he died abroad he should be buried where he died, but that if he died within the United Kingdom he should be buried at Glen Tana. He was accordingly buried there. He seems to have frequently considered where he should be buried. But I think that the evidence shews that he did not finally make up his mind on the matter until he made his last will shortly before his death.

"Some time prior to his death Sir William seems to have entertained the idea of giving up his house in London, and he made some inquiries with the view of selling the furniture. He also appears sometimes to have spoken of giving up Barlow Hall, but I do not think that he ever had any serious intention of doing so. As matter of fact he was in possession of both houses at the time of his death.

"He left two testamentary settlements. One in the Scotch form and prepared in Scotland, the other in the English form

H. L. (Sc.) 1905

HUNTLY (MARCHIONESS) v. GASKELL.

prepared by Mr. Wood, his legal adviser in Manchester. The former dealt only with the Scotch estates, the latter with all his other means and estate. His own wish had been to leave only one settlement, but Mr. Wood advised him, and ultimately he accepted the advice, to have a Scotch settlement dealing with the Scotch estates prepared by a conveyancer in Scotland. The trustees under both the settlements were the same. They were all Englishmen residing in England.

"By his Scotch settlement he left his whole heritable estates in Scotland to trustees for behoof of his grandson Ean Francis Cecil, and the heirs of his body, whom failing his grandson Richard Cecil, and the heirs of his body, whom failing to his daughter Lady Francis Cecil. A life rent of Aboyne Castle was reserved to Lady Huntly.

"By the English settlement Sir William left his personal property in Scotland (which I understand consisted entirely of furniture and other corporeal movables) to the persons who were to take the Scotch estates. The whole residue of his estate real and personal he directed to be realized, and divided among his grandsons and granddaughters.

"In the Scotch settlement Sir William is described as 'Sir William Cunliffe Brooks, Baronet, of Glen Tana,' and in the English settlement as 'Sir William Cunliffe Brooks, of the city of Manchester, Baronet.' He made first and last an immense number of wills. In those made according to the English form prior to 1895, he is described as 'of No. 5, Grosvenor Square, in the county of Middlesex, of Barlow Hall, in the county of Lancaster, and of the Forest of Glen Tana, in the county of Aberdeen, Baronet'; and in those made after 1895 as 'of the city of Manchester, Baronet.' When making a settlement of his Scotch estates according to the Scotch form he was described as 'Bart. of Glen Tana.' I do not think that the designations in the various wills can be regarded as being simply those which were selected by the conveyancer who prepared the deeds, because Sir William was a man who scrutinized the smallest details, and there is evidence that he was particular in regard to the way in which he was designated in any deed which he proposed to execute.

"There is also evidence, upon which both parties relied, which shews that Sir William's attention was called to the question of his domicil. In 1892 he wrote to Mr. Wood: 'See enclosed. Am I a domiciled Scot?' The 'enclosed' was a cutting from a newspaper in the following terms: 'The Sutherland Heirlooms: Important decision. A domiciled Scotchman could not make a will by which he disposed of his personal estate to more than a certain extent.'

"In reply, Mr. Wood gave a very decided opinion that Sir William was not a domiciled Scot. In 1893, however, Sir William sent to Mr. Wood a newspaper report of a case which had been brought in the Court of Session, in which the question of the domicil of Sir James Mackenzie, of Glenmuick, was raised. In an accompanying letter he wrote: 'At the risk of telling you what you already know, I send the enclosed to direct your attention to the question of Scotch and English domicil.' Mr. Wood replied that his opinion remained the same, namely, that Sir William's domicil was English.

"Again in 1895 Sir William recurred to the matter. A case in regard to the domicil of an artist (a Scotsman by birth) had been decided in the English Courts. Sir William sent to Mr. Wood a newspaper report of the case, and wrote: 'You will care to see the enclosed on domicil.' Mr. Wood again replied that he had no doubt as to Sir William's domicil being English. There is no evidence that Sir William ever again opened the question of his domicil.

"The pursuer argued that the correspondence shewed that Sir William was himself doubtful as to the country of his domicil, otherwise he would from the first have accepted the opinion of Mr. Wood.

"I am inclined to think that the sounder inference is that for which the defenders contend, that Sir William was in the end satisfied with Mr. Wood's reiterated opinion. Sir William was extremely pertinacious, and was not the man to allow a matter in which he was interested to rest, until he was satisfied. And the question of domicil was one in which he was interested. I think that there is no doubt that what first drew his attention to the matter was the statement in the report of the Sutherland

H. L. (Sc.) 1905 HUNTLY (MARCHIONESS) v. GASKELL.

case that a domiciled Scotsman could not make a will by which he disposed of his personal estate to more than a certain extent. That was a point which touched Sir William closely. The position of the Marquis of Huntly's affairs caused him much trouble, and his correspondence shews how anxious he was to secure that any provision which he might make for Lady Huntly should not fall into the hands of the Marquis or his creditors. If Sir William had thought that there was any chance of Lady Huntly being entitled to claim as her absolute property part of his personal estate, I think that we would have found him seeking for some means by which such a result could be avoided."

Dec. 12, 13, 14. *H. T. Eve, K.C.*, and *Lord Kinross* (the latter of the Scottish Bar) (with them *W. Coldridge*), for the appellant. It may be conceded that the onus is upon the appellant to prove by evidence that Sir William Cunliffe Brooks became a domiciled Scotsman; in other words, that he changed his English domicil for a Scottish one. The true issue in all questions of change of domicil is whether the person in question has voluntarily settled or made his home in a new territory with the unlimited intention of there continuing to reside; such residence coupled with the animus manendi, is in itself sufficient to bring about a change of domicil. Domicil is the inference which the law derives from the circumstances of a man's life; his own interpretation being only important as interpreting the nature and character of the residence under consideration. In each case the question was, could the new domicil be said to be the place "intended" to be the permanent home: *Bell* v. *Kennedy* (1); *Udny* v. *Udny* (2); *Winans* v. *Attorney-General* (3); *Douglas* v. *Douglas* (4); *Fairbairn* v. *Neville*. (5) The evidence establishes that—(1.) Sir William's permanent residence was in Scotland. (2.) That it was a residence chosen with the intention to remain there for the rest of his life. (3.) That he had no intention during the rest of his life to return to England as his permanent home. It did not matter what Sir William wanted, if what he

(1) (1868) L. R. 1 H. L. Sc. 307, 311.
(2) (1869) L. R. 1 H. L. Sc. 441, 458.
(3) [1904] A. C. 287, 288.
(4) (1871) L. R. 12 Eq. 617, 644.
(5) (1897) 25 R. 192.

did effected the change. As to the bank in Manchester, his participation in its management after he fixed his home in Scotland never went beyond seeing the reports, objecting to overdrafts, signing balance sheets, giving an annual dinner to the bank staff, and drawing the larger part of the profits. The purchase of land in England was to round off his English estate. From 1880 the English houses were only kept for convenience. Barlow Lodge had no staff of servants to attend on him, and was never used for hospitality, except to give a dinner to the bank staff. No reliance can be placed on his renting a town house, it was only held in connection with his parliamentary duties. In 1900 the longest stay there was for nineteen days. As to the question of Scottish and English wills, he was nervous lest after his death some question would lead to litigation. Although at first only a leaseholder of Glen Tana, he was not exactly a leaseholder, for his son-in-law would reap all the benefit of the large sums he laid out on it. No doubt he bought it in 1900 because he was forced to do so. Yet he was delighted with the purchase, and said it was the "first time he sat under his own roof." There is nothing to drive the appellant from the position that Sir William had had, at the end of his life, a long residence in Scotland and the intention of remaining there. His family was there, also all his collection of furniture, family Bible, and material correspondence. Where a man makes his home, there his domicil must be held to be. In all cases the question has been asked, "Where did the man fix his permanent home?" The appellant has discharged the onus, and proved that Sir William Cunliffe Brooks was at his death a domiciled Scotsman.

[They also commented on *Attorney-General* v. *Pottinger* (1); *In re Steer* (2); *Somerville* v. *Somerville*. (3)]

Sir Edward Clarke, K.C., Thomas Shaw, L.A., W. J. Cullen, K.C., Charles Church, and *J. Adam* (the second, third, and fifth of the Scottish Bar), for the respondents, were not called upon.

The House took time for consideration.

(1) (1861) 30 L. J. (Ex.) 284; 6 H. & N. 733.

(2) (1858) 28 L. J. (Ex.) 22.

(3) (1801) 5 Ves. 749, 750.

H. L. (Sc.) 1905 — HUNTLY MARCHIONESS) v. GASKELL.

Dec. 14. EARL OF HALSBURY. My Lords, notwithstanding the length to which this case has gone, and the exhaustive learning that has been brought to bear upon it in the Courts below and at your Lordships' bar, it appears to me that it turns upon a very small point, and I myself have not been from the first able to entertain the smallest doubt that the judgment of the Lord Ordinary, in the first instance, and the Inner House afterwards, was perfectly correct. More than once in the course of the case I have had occasion to observe that I do not believe that there is any question or doubt about what the law on the subject is. It is very often a question of complicated facts from which the tribunal, which is called upon to determine the question, has to infer a variety of things with reference to the domestic and commercial life of the person whose status is being inquired into; and naturally, when that is the case, there has been a great variety of forms of expression, sometimes figurative, which the learned judges from time to time have used in order to indicate what the particular facts then in debate before them point to as the principle upon which the question should be decided. I myself have entertained no doubt what that question is, and the way in which it should be decided, but, of course, other minds take different views about the mode in which it should be expressed. I myself think in my view of the law that it is expressed very well indeed by Lord Curriehill, approved and quoted by Lord President Inglis in the case of *Steel* v. *Steel*. (1) "It is, I think," says the learned judge, "by no means an easy thing to establish that a man has lost his domicil of origin, for, as Lord Cranworth said in the case of *Moorhouse* v. *Lord* (2), 'In order to acquire a new domicil, a man must intend Quatenus in illo exuere patriam,' and I venture to translate these words into English as meaning that he must have a fixed intention or determination to strip himself of his nationality, or, in other words, to renounce his birthright in the place of his original domicil. The serious character of such a change is very well expounded by Lord Curriehill in the case of *Donaldson* v. *M'Clure*. (3) He says: 'To abandon one domicil

(1) (1888) 15 R. 896. (2) (1863) 10 H. L. C. 272.
(3) (1857) 20 D. 307.

for another means something far more than a mere change of residence. It imports an intention not only to relinquish those peculiar rights, privileges and immunities which the law and constitution of the domicil confer on the denizens of the country in their domestic relations, in their business transactions, in their political and municipal status, and in the daily affairs of common life, but also the laws by which the succession to property is regulated after death. The abandonment or change of a domicil is therefore a proceeding of a very serious nature, and an intention to make such an abandonment requires to be proved by satisfactory evidence.' "

My Lords, I do not believe that it could be expressed more clearly or distinctly than it is in that judgment; and, applying that principle to the question now before your Lordships, I say that I regard with something like amazement the fact that the question should have been debated so long under the circumstances which are in proof before your Lordships. I should have thought that it was very difficult indeed to suggest with respect to this particular testator that there was the slightest indication in any part of his career of an intention to abandon his domicil of origin. He was an Englishman, his property in great measure was in England, his constituency which he represented in Parliament was in England, and I should have thought that it was impossible to doubt that there were at least three residences which he had, about which it might have been equally said he made his home there. It does not follow that they were all three equally popular with him, or any one of three the main abiding place for the greater part of the year during which he lived in each of them in turn. But what is the inference to be derived from that? I should have thought that the obvious inference which anybody would draw would be that there was no intention to change his domicil. That he had three residences is true, but unless you can shew something else than the fact that a man of great wealth, who had three residences, preferred one rather than another, either in respect of sport at the earlier period of his career or in respect of the state of his health at a later part of his career clearly he found that Glen Tana agreed with him better and that the air was better, are you to infer, or

H. L. (Sc.) 1905

HUNTLY (MARCHIONESS) v. GASKELL.

Earl of Halsbury.

is there any evidence from which you can infer, an intention to change his civil status? It seems to me that every part of his career points to the same conclusion. Being a very wealthy man, and doing whatever he liked to do, he might go to Antibes at one time with as much idea of change, in the sense of changing his status at Antibes, as at Glen Tana, but the real truth was that no change of any sort or kind is suggested by what he did. It is admitted that mere residence is in itself nothing. There may be continuous residence, or what I think has been appropriately suggested as being the most satisfactory word to use, "settling" somewhere, which of course involves residence as part of it, and if it was suggested that a man had gone to settle at some particular place and had abandoned all other connection and all other country, I think that inference might be natural and just; but to suggest in the case of a man of great wealth, who is wandering from one place to another from time to time, although he may spend a larger part of his time in Scotland than elsewhere, that that of itself should be anything from which anybody could draw an inference that he meant to change his domicil, seems to me to be a very monstrous proposition.

Now upon one part of this case I confess it appears to me that sufficient reliance has not been placed by those who have had this matter under discussion, and that is the nature of the man himself, the sort of character he had, and what he was endeavouring to settle. These are all elements to be taken into consideration when you come to this question. The idea had occurred to him during his lifetime that some question might arise as to his domicil; he had seen some case in the Scottish Law Reports which suggested to him that there might be some question raised after his death, and he had been dealing very accurately and carefully with the question of how he was to settle his affairs. He applies to a lawyer whom he had great confidence in, and says: "Now, is it true that I am a domiciled Scot?" Can anyone doubt what the meaning of that was? I must say I infer, together with all the other learned judges who have dealt with this question, that what he meant was to satisfy his own mind because he thought some question, which unfortunately has notwithstanding his care arisen, might

arise after his death. He wanted to be advised whether there was anything he could do in order to prevent such a question arising, upon which he is assured, and I think accurately assured by the learned gentleman who was advising him, that there was no doubt whatever that he was an Englishman, and that he need not trouble himself about any questions which might arise on the difference between Scottish and English law and the suggestion that he was a Scotsman. More than once he has this assurance given to him. Now is there the slightest evidence that after that he did or said or desired to do or say anything which could raise any doubt upon the matter about which he had been so completely assured by his legal adviser? Of course, the answer must be that there was nothing. What is the inference which your Lordships must draw from that? To my mind it is perfectly clear that he knew, because it had been explained to him—he was not without advice—what the distinction was, and what domicil meant, and the assurance that he was an Englishman contented him and satisfied him, and he did no more.

For my own part I cannot entertain the smallest doubt that from that moment he had satisfied himself that he was, as he intended to be, an Englishman, and retained his English domicil. Under those circumstances it appears to me, notwithstanding the enormous length to which this case has gone, that there is a very plain and obvious answer to the appellants' case.

My Lords, I do not think it is necessary to go through all the different points of fact which have been called to our attention by the learned counsel who has with great diligence and care presented every fact that could be appropriately presented to your Lordships for consideration, because I must say, having read the Lord Ordinary's judgment and the judgment of Lord Kinnear, I have come to the conclusion that every topic that could be invoked and discussed has been satisfactorily invoked and discussed by the different learned judges who have given their attention to this subject; and, speaking for myself, I say most sincerely that I do not think there is anything more to be said about it. They have exhausted the whole topic. Every

H. L. (Sc.) 1905

HUNTLY (MARCHIONESS) v. GASKELL.

Earl of Halsbury.

portion of this gentleman's life has been examined with the minutest care, and the only inference I think that I can possibly draw from the picture that has been presented to us by this accurate historical narrative of this gentleman's life is that he never had the slightest idea of abandoning his domicil of origin, and least of all, that he intended by a domicil of choice to make Scotland his home, or Scotland the place of his domicil, so as to put in peril the question which he obviously was disturbed about at one time, namely, whether or not the laws of Scotland and the difference between English and Scottish law might interfere with testamentary dispositions.

My Lords, under the circumstances I move your Lordships that this appeal be dismissed. It appears to me that the question lies now in a very narrow compass indeed, and we have satisfactorily, I think, come to a conclusion, in accordance with that of every other judicial authority which has been appealed to, that there is no doubt whatever that the domicil of origin of Sir William Cunliffe Brooks was England, and that accordingly this appeal must be dismissed.

LORD ROBERTSON. My Lords, I think the present a very clear case.

In the first place it is not a case like *Bell* v. *Kennedy* (1) where a man has severed all ties with the country of his birth except the inseparable one of birth, where, accordingly, there is but one question to consider, and that is the adequacy of the residence in the new country to constitute domicil. In the present case, not only was Sir William Cunliffe Brooks born in England, but he remained to his death deeply rooted in England by business which he continued to carry on, by large real property which he retained, and by two residences which he never ceased to keep open and periodically to stay in. It may truly be said of him that he severed none of his ties to England; and the only point made is that having, like many Englishmen, bought a house in Scotland, he, being very rich and master of his own time, spent much the greater part of the year there. Even on this point it is well to observe that his

(1) L. R. 1 H. L. Sc. 307.

buying Glen Tana was due to compelling circumstances, and was not an act of election. No doubt at all he was very fond of the place; and, being a person of emphatic and florid speech, he spoke of it occasionally—especially (although not always) when addressing Deeside people—as his true home, and the place where he felt at home. But it is a fallacy to regard this as an election of one home in substitution for another. A great many people who have a house in town and a house in the country have two homes—they speak of them as such, each is the home when the household gods are there; and the country house, being the place of recreation, is generally the object of the more exuberant expressions of attachment.

But, speaking of the present case, it seems to me that this attempt to turn a strenuous English banker and great landed proprietor into a Scotchman is, on the face of the broad facts, hopeless. The good sense as well as the law of the matter were, as has been mentioned by my noble and learned friend on the woolsack, expressed by Mr. Wood in answer to what clearly was the alarmed inquiry of Sir William, "Am I a domiciled Scot?" "No; your domicil of origin is English. Although you have a residence in Scotland, you have not abandoned your English domicil." And in Sir William's own considered descriptions of himself for books of reference the true perspective of his English and Scottish connections is restored.

I think it wholly unnecessary once more to examine the authorities on the law of domicil, as the facts of this case do not come near any question of delicacy. I have only to add an expression of regret that the parties should have brought on themselves such enormous expense by exploring and presenting minute and complicated details when the broader facts are conclusive.

LORD LINDLEY. My Lords, I am entirely of the same opinion. I have listened with great attention and great pleasure to the extremely able arguments addressed to us by Mr. Eve, but the conclusion which I have arrived at, after carefully considering the whole of the evidence to the best of my ability, is that the only intention which is consistent with the whole of this

H. L. (Sc.) 1905 HUNTLY (MARCHIONESS) v. GASKELL. Lord Lindley.

gentleman's conduct, and with what he said, is an intention not to abandon his English domicil. I quite agree. I think the case is quite exhausted by the Scottish judgments, and the only conclusion is that the appeal ought to be dismissed.

Ordered that this appeal be dismissed with costs.

Lords' Journals, December 14, 1905.

Agent for appellants: *L. Weatherley, for Alex. Morison & Co., W.S., Edinburgh.*

Agent for respondents: *H. G. Church, for J. & A. F. Adam, W.S., Edinburgh.*

[HOUSE OF LORDS.]

H. L. (Sc.) 1905 *Dec.* 15

JOHN WHITE & SONS AND OTHERS . . . . APPELLANTS;

AND

J. & M. WHITE AND OTHERS . . . . . RESPONDENTS.

River—Rights of Riparian Proprietors—Abstraction of the Whole of the Water from River—Ex adverso Mill Owners.

By the general law applicable to running streams every proprietor has a right to the ordinary use of the water flowing past his land, also rights may be acquired by prescription which interfere with the natural rights of other proprietors; but the ownership of an artificial dam, although it may give a right to maintain the dam, does not turn the running stream into a pond so as to give the owner of the dam an exclusive right to use the whole of the running water.

APPEAL against an interlocutor of the Second Division of the Court of Session, Scotland. (1) J. & M. White and others (the respondents) were owners of the Old Mill of Partick on the river Kelvin, otherwise known as the Bishop Mill, and they raised this action for declarator. The appellants were John White & Sons, owners of the Scotstoun Mill, and were, with the owners of another mill called the Slit Mill, defenders to the action, but the latter had retired from the case, and the question was only between the owners of the Bishop Mill and the owners of the Scotstoun Mill.

(1) (1905) 42 S. L. R. 330.

These grain mills were on opposite sides of the river Kelvin. The Partick Mill dam was formed by a weir across the river Kelvin, which at this point flowed from east to west. The Bishop Mill was on the north side, and the Scotstoun Mill on the south side. They were nearly but not quite ex adverso. Both mills were supplied by water banked back by a dam which had been in existence for about 800 years. The conclusions of the respondents' summons (as amended) were: (1.) That they were entitled to the first waters of the Kelvin for the use of their mill as the same then existed as regards its capacity to draw water—that is to say, to the extent of 6000 cubic feet per minute (without prejudice to the rights and pleas of the parties in the event of any further extension of said mill), and that in preference to the Scotstoun Mill. (2.) That the owners of the Scotstoun Mill were not entitled to withdraw any water from the dam of the river Kelvin immediately above the respondents' and appellants' mills, or to allow any water to pass therefrom through their sluices at any time, save and except only when the dam was full and the water therefrom either standing level with the dam head or running over, and then only to the extent of 2077 cubic feet per minute. The Lord Ordinary (Lord Kincairney) found (July 6, 1904) that the first part of the conclusions of the summons seemed to claim unrestricted use of the water in the dam so long as it could be utilized for the Bishop Mill. That the second part of the conclusions seemed to deny the appellants' right to draw water from the dam except when it was full: and the learned judge absolved the appellants from these conclusions. The learned judge stated the facts as follows:—The Bishop Mill is of very ancient date. A charter of King David the First was produced. It appeared that the magistrates of Glasgow possessed the Bishop Mill for a very long period as kindly tenants, and that it was not until 1738 that they obtained a Crown charter. That charter proceeded on the narrative that past human memory the magistrates possessed the dam with the mill house and certain ground, "being parts of the barony of Glasgow," as kindly tenants and rentallers. The charter then proceeded to dispone to the magistrates and their successors heritably and irredeemably the Mill of Partick, on

H. L. (Sc.) 1905 JOHN WHITE & SONS v. J. & M. WHITE.

the water of Kelvin, with thirlage and multures and the services at the mill all in the ordinary terms "cum stagnis lie Damms Inlairs et aquæductis aliisque integris privilegus et pertinentiis ejusdem." Prior to that date it does not clearly appear that anyone except the magistrates made use of the dam. But about that time a company called the Smithfield Company built what is called a slit mill (namely, a mill for splitting iron), and they applied to the magistrates for leave to carry an aqueduct from the Partick Mill dam to a dam to be erected on their own ground for their slit mill. This petition was granted by the magistrates, and the aqueduct and dam were constructed, but the minute bears that the operation is to be conducted "in such manner that the said Mill of Partick shall receive no detriment or prejudice, and shall be kept in the same order and condition as it is now."

"This minute bears date, May 30, 1738, before the Crown charter, but it was confirmed by another minute dated January 3, 1740.

"The owners of the Scotstoun Mills were not mentioned in these proceedings.

"A deed dated 1780 by the Smithfield Company bears to sell and dispone to one John Craig, Scotstoun Mill, with certain other subjects mentioned. First, the Scotstoun Mill was a waulk mill or fuller's cloth mill, for which, it was said, a mill dam was not essential. But that was not of importance, as the deed bears that 'it was now' (that is in 1780) 'made use of as a corn mill.' This disposition by the Smithfield Company (Slit Mills) to Craig bears the following clause: 'But alwise with and under this condition and provision as it is hereby expressly conditioned and provided that the said John Craig and his foresaids and the miln before disponed, shall have no right to the water of Kelvin until the Old Miln of Partick is first served, she having the first water, and untill our works at our Slit Miln on the water of Kelvin for rolling and slitting of iron and grinding of tools is next served, they being declared to have the second water, the same being hereby limited to three wheels the foresaid Waulk Miln of Partick hereby disponed being only to have the third water and for one wheel only. But in case at any future period

we or our foresaids shall find it convenient or necessary to discontinue the manufactory of rolling and slitting of iron and grinding of tools and shall instead thereof erect any other milns or machinery which may require a greater quantity of water than is now used by us, then and in that case the second water so now reserved for our present works shall in all times thereafter during the scarcity of water be applied for the driving the new machinery so to be erected in the proportions stated, namely, three-fourths of said water shall be applied for the use of the machinery so to be erected by us and our foresaids, and one-fourth thereof shall be applied for the use of the Scotstoun Miln aforesaid, or our said works so to be erected shall go eighteen hours of the twenty-four, and Scotstoun Mill shall go the remaining six hours. But in case that we or our foresaids shall have occasion in future to erect upon our works any water-wheels beside the foresaid three, all such wheels above three shall have no privilege of water (until the Scotstoun Miln is fully served) whether used as a corn miln or for other purpose, and shall only be used at such times when there is a superplus quantity of water in the river Kelvin running over the dam head after serving the Miln of Scotstoun as aforesaid.' "

The owners of the Bishop Mill were not parties to this deed, although their right to the first water is affirmed or acknowledged in it. Then it is also said that the Slit Mill is to have the second water limited to three wheels, and the Waulk Mill of Partick (namely Scotstoun) is to have the third water and for one wheel only.

Owing to the American Revolution and the loss of that market for split iron, &c., "the Slit Mill was closed a considerable number of years ago, and no water has since been drawn from the dam on its account."

The Bishop Mill, after passing through intermediate owners, was sold and disponed to the respondents in 1897. Scotstoun Mill appears to have remained in the possession of John Craig and his successors until 1839, when it was sold to John Blackwood, and by him in 1854 to John White, father of the appellants, from whom it passed in 1897 to the present appellants. With regard to the possession and use of the dam by the Bishop Mill and

H. L. (Sc.) 1905 JOHN WHITE & SONS v. J. & M. WHITE.

Scotstoun Mill, it appears that the parties are agreed—(1.) that Bishop Mill was entitled to draw, and did draw, the first water; (2.) that from 1780 to 1865 the owners of Bishop Mill drew no more than 1200 cubic feet per minute. Further, the parties are agreed that about that time the Scotstoun Mill was in use to draw 2,077 cubic feet per minute, but that only after the Bishop Mill's right to the first water was satisfied.

Frequent litigation took place between the parties, the most important of which was before Lord Neaves in 1854. (1)

"In 1900 the pursuers (respondents) put up a turbine wheel and maintained that they were entitled so to use their "first water." They also alleged that the Scotstoun Mill had on various occasions drawn water when the dam was so low as not to be sufficient for their preferable uses, and various other occasions of complaint and difference have arisen and questions as to their relative rights have been raised, to settle which this action was brought.

As to the meaning of "first water," "the Scotstoun owners admit that the Bishop Mill owners are entitled to a certain preference which they call "first water." But they maintain that the amount of first water must be determined by the previous usage, that is, to the extent of 1200 cubic feet per minute. On the other hand, the Bishop Mill owners claim the right to the water absolutely without any restriction, unless it be only that they are bound to use the water for the mill. They maintain that the deed of 1738 gave them an absolute right just as if the dam was a rood of agricultural land. There is no question about the property of the alveus; it has not been suggested that anyone is proprietor of the alveus except the respondents under their Crown grant. But this question is about the water, not the alveus. For more than forty years the respondents drew a comparatively small part (1200 cubic feet) of the water from the dam and left the rest to others. The appellants maintained that, as riparian proprietors, though they were nothing else, they could object to the respondents' summons. They said that, conceding the respondents' right of property in the dam, still the respondents could not abstract more water

(1) The pleadings in these litigations were set out in the printed case.

from it than their prescriptive use warranted, because it was flowing water. The appellants further maintained that no property in the water could be acquired without appropriation.

The respondents maintained that their case was not affected by the negative prescription because, although they did not make full use of their property, their abstention was res meræ facultatis and could not affect their right. For much more than forty years (perhaps a hundred) the proprietors of Scotstoun supplied their mill with water from the dam. They and the respondents were using the dam together. But now it was objected that they, the appellants, had no title on which their plea of prescription could be vested.

The Second Division of the Court of Session (Lord Young dissenting) by interlocutor dated January 20, 1905, recalled the Lord Ordinary's interlocutor and found in terms of the declaratory conclusions of the action.

Dec. 4, 5, 7, 8. *J. Avon Clyde, S.-G. for Scotland,* and *W. J. Cullen, K.C.* (of the Scottish Bar), for the appellants. The appellants admit that the respondents' Old Mill has a preferential right to the first water, but that preferential right is limited to 1200 cubic feet per minute. The appellants are, on the other hand, entitled to 2700 cubic feet after the Old Mill has taken its 1200 feet. The law of Scotland applicable to the right of opposite riparian proprietors is that each riparian proprietor is entitled to the natural flow of the stream as it passes his ground; that right arises from riparian ownership and does not depend upon ownership of any part of the solum of the stream. Further, each proprietor is entitled to veto the withdrawal of water for manufacturing purposes by the ex adverso proprietor, except in so far as the matter has been settled by agreement or in so far as the ex adverso proprietor has used the right of withdrawal for the prescriptive period of forty years; and secondly, when there has been prescriptive possession, the right thereby acquired is measured by the extent of the prescriptive use.

Assuming that the dam, so far as artificial, was originally constructed by the proprietors of the Old Mill, and was used for the prescriptive period; the measure of the acquired right to withdraw

H. L. (Sc.) 1905

JOHN WHITE & SONS v. J. & M. WHITE.

water in the future could not be greater than the prescriptive use which they had had. The ownership of the dam cannot enable the respondents to claim a larger right. The dam was a natural barrier of rock, the elevation of the water being raised by wooden boards two or three feet high. The respondents now claim the right to take the whole water in the Kelvin. The litigation between the parties shewed what the Old Mill owners thought was their right, and shewed that all the proprietors of the Old Mill claimed was 1,200 cubic feet. Further, it shewed that the Old Mill had not the whole water, as a surplus over its right of water was spoken of.

The Kelvin is not a very large river, and in the dry parts of the year the regulation of the water rights is a matter of practical importance. The whole contention of the appellants is against the expansion of the respondents' right. The case of the respondents is that their right is not limited to the capacity of the mill, as it existed before the memory of man, but is a right to all the water of the river. The question is, can the respondents enlarge their draught of water to-day to 6000 cubic feet, and perhaps to-morrow to 20,000 feet? In that case, there would not be enough for both. The discontinuance of the Slit Mill taking water conferred no additional right on the Old Mill, as against the owners of the Scotstoun Mill. The Scotstoun Mill originally possessed the right to the second water, subject to the prescriptive preferable use had by the Old Mill; and the restrictive use of the water by the Scotstoun Mill in 1780 was res inter alios acta in a question with the owners of the Old Mill, and could not enlarge the rights of the Old Mill.

[They referred to *Lyon & Gray* v. *Bakers of Glasgow*. (1)]

Scott Dickson, L.A., and *R. T. Younger, K.C.* (of the Scottish Bar), for the respondents. The judgment of the Second Division is correct. The respondents are entitled, by grant from the Crown, to the dam, and are entitled to withdraw water therefrom to such an extent as is required for the use of their mill. The appellants have by their documents no right to the dam at all. The respondents are not limited to 1200 cubic feet. They are entitled to withdraw 6000 cubic feet for the use of their mill, preferably to

(1) (1749) Mor. Dict. 12789.

the appellants. On the other hand, the appellants are limited to 2077 cubic feet when the dam is running over, that being the capacity of their sluices, and the result of the previous litigation.

The solum of the river at this point is the property of the respondents, and by grant they own the water at this part of the river. The dam in the documents was always referred to as the property of the owner of the Old Mill, and he was required to be at the expense of keeping up the weir. The appellants' title gave them a piece of ground which did not come down to the Kelvin; and also gave them a right of access to the water. If the owners of the Scotstoun Mill had been riparian proprietors there would have been no necessity to obtain the right of access to the river. The respondents had all the rights of the Slit Mill and the Old Mill. The amount now withdrawn by the respondents, namely, 6000 feet, is less than the amount withdrawn in past time by the Slit Mill (5515 cubic feet) and the Old Mill (1200 cubic feet), that is a total of 6715 cubic feet preferably to the Scotstoun Mill. The Slit Mill took its water by permission of the Old Mill, and its rights are continued to the Old Mill. So long as the Scotstoun Mill took in water when the dam was full or running over, the Old Mill had no interest to object. This is not a case of interest in a running stream. It is a case of interest in a dam, which the Scotstoun Mill owners had nothing to do with either by grant or prescription.

[They referred to *Smith* v. *Stewart* (1); *Gellatly* v. *Arrol* (2); *Leck* v. *Chalmers*. (3)]

J. Avon Clyde, *S.-G. for Scotland*, in reply.

The House took time for consideration.

Dec. 15. EARL OF HALSBURY. My Lords, a grant of a tract of a natural river and apparently of all the waters in it is a novelty in the law, and one which, upon the facts in this case, it seems impossible to insist upon. The rights inter se of the different mill owners are capable of being ascertained without much difficulty. Lord Kingsdown, in *Miner* v. *Gilmour* (4), stated the rule in terms that have generally been adopted ever

(1) (1884) 11 R. 921.
(2) (1863) 1 M. 592.
(3) (1859) 21 D. 408.
(4) (1858) 12 Moo. P. C. 131, 156.

H. L. (Sc.) 1905

JOHN WHITE & SONS v. J. & M. WHITE.

Earl of Halsbury.

since. By the general law applicable to running streams, every riparian proprietor has a right to what may be called the ordinary use of the water flowing past his land. Further, he may, subject to the condition that he does not thereby interfere with the rights of other proprietors either above or below him, dam up the stream for the purpose of a mill.

Of course, rights may be acquired by prescription, which, to some extent, do interfere with what would otherwise be the natural rights of other proprietors both below and above; and I have no doubt that it is here proved that the Old Mill has acquired the right which has been popularly known as the first water, and enjoyed it for a very long period. The extent of that right and the measure of what this involved is in this case one of the questions which have been debated at the Bar and in the Court below, but, as it appears to me, without sufficient reason. The question here is whether the Old Mill is entitled to the whole of the waters.

Apart from the extraordinary, and to my mind impossible, right suggested, which I have first mentioned (I will say no more about it than that there is not the least evidence to support it here), the question comes in this case to the ordinary controversy between proprietors of the banks of a running stream when their operations respectively interfere, or are alleged to interfere, with the operations of each other. In some curious manner—a manner which it is very difficult to understand—it seems to have been assumed in some of the arguments here that the artificial addition to the natural rock, which, to some extent, forms the dam, has made some difference to the rights of the parties. The right to maintain that artificial addition to the rock may be assumed; but it does not follow that the addition to the rock has in any respect altered the legal relations of the parties and made what has been part of a running stream hitherto less a running stream, or turned it into a pond, so that the water enclosed within that pond should become, not publici juris, but water with somewhat of a proprietary right.

A controversy not at all unlike the present arose in the county of Lancashire just one hundred years ago; the cause was tried before Graham B. in 1805. It appeared that mills

had been erected a very long time before, in 1724, and that additions had been made to them at successive periods of forty and twenty years by the defendants. In 1787 the plaintiffs erected their mills, but in 1791 the defendants altered their works, and the sluices by which their works were supplied from the River Irwell were considerably widened and deepened, so that nearly double the quantity of water was drawn from the Irwell than had ever before been taken. This was proved to have materially impeded the plaintiff's works; it interfered with the working of the comparatively new mills which had been erected in 1787. An action was brought before Graham B., and in dealing with the rights to which I have referred that learned judge said this to the jury: "The important period for them to attend to was 1791, when it was clear that an increased quantity had been drawn by the defendants from the river by means of the then newly enlarged and deepened sluices, before which time the plaintiff's works had been erected, and he was in the enjoyment of so much of the water as had not been appropriated by those under whom the defendants claimed. As a matter of law, I tell you that persons possessing lands on the banks of rivers have a right to the flow of the water in its natural stream unless there existed before a right in others to enjoy or to divert any part of it to their own use; that every such exclusive right was to be measured by the extent of its enjoyment."

This direction was objected to, and it was urged that the enjoyment by the defendants from 1724 downwards was evidence to be left to the jury of the defendants' right to the whole of the water. The Court of Queen's Bench, with Lord Ellenborough C.J. presiding, held unanimously that Graham B.'s direction was accurate, and some of them added that if the verdict had been the other way they would not have allowed it to stand. The case to which I refer is *Bealey* v. *Shaw*. (1)

My Lords, it appears to me that this principle which has been thus laid down and has been well recognized and acted upon as law for one hundred years, is decisive of the present case. According to that principle there is no ground for the contention

(1) (1805) 6 East, 208, 214.

H. L. (Sc.) 1905

JOHN WHITE & SONS v. J. & M. WHITE.

Earl of Halsbury.

of the pursuers that they have a right of property in the dam and the water, and that consequently they are entitled to increase the extent of the use thereof as occasion requires. That is a proposition for which it appears to me there is no legal foundation whatever, and I think that the pursuers are not entitled to any preferable right to the use of the waters of the dam to a greater extent than is in accordance with prescriptive usage.

This, my Lords, is sufficient for the decision of this case; we are not trying the exact proportion in which each mill may be entitled to draw water. That which the pursuers claim is an absolute and exclusive right to withdraw all the water. I think that claim is unfounded. I am unable to understand what one of the learned judges—Lord Moncreiff—says at the end of his judgment: "It is not necessary to say how matters would have stood if the pursuers had proposed to add so materially to the machinery of the mill as really to alter its character and deprive the defenders of any water for their mill." I do not understand this proposition as a matter of fact, because that is what I understand the evidence to prove that the pursuers have actually done; nor do I understand it as a matter of law, since if the ground of judgment is right the pursuers here have a right to take all the water.

My Lords, I think the Lord Ordinary's judgment is perfectly right and ought to be restored, and I move that the judgment o the Court below be reversed and the judgment of the Lord Ordinary restored with the usual consequences as to costs.

LORD ROBERTSON. My Lords, I cannot say that I think this a doubtful case; and it is permissible to believe that less difficulty would have been found in the Court of Session if it had been remembered that this is a question between riparian proprietors as to the water of a river.

The claim of the respondents is to withdraw from the river Kelvin, in preference to everybody else, 6000 cubic feet of water per minute, for the use of their mill. They fix on this figure because that is the requirement of their existing machinery, but they avow that if in the future their requirements increased

so would their claim. Now the 6000 cubic feet per minute only began to be abstracted in 1900, when they got some new machinery, and before that they used very much less water. Their claim, therefore, is not supported by prescriptive use.

Now, the theory of the respondents' case is that the water from which they abstract the water is the dam of their mill; but it is in fact a pool in the river Kelvin, the water of the river moving slowly through the pool owing to a natural obstruction of rock. Owing to this natural storage of the water, this part of the river has served the purpose of a dam for the respondents' mill, and the natural barrier of rock has been a little heightened by a ledge of wood. The central fact in the case, however, is that this pool, while it may be called a dam rightly enough in relation to the respondents' mill, is not the less, in juridical quality, a part of the river, and its water is subject to the common law of rivers.

Regarding this stretch of the Kelvin, the respondents' case is stated in Condescendence 2 with a frankness which might well have excited the suspicion of the learned judges, for there the assertion is made that the respondents (whose frontage to the river is only a fraction of the frontage of the pool) have a grant not only of the (so-called) "dam in question" and "solum thereof," but of the "water therein." This proposition is, of course, opposed to elementary ideas about the water of a river, for the water would not be the property even of the exclusive owner of the solum and of both banks at the place in question. And yet when the present controversy is examined it will be found difficult to support the respondents' case on any other theory.

The claim being one of property, we look to the respondents' titles, and it is unnecessary to refer to more than two, the title of 1738 and the title of 1897. The former is a Crown charter; it grants the mill, which it describes as "super aquam de Kelvin," and then, after granting the thirlage and multures and other things, goes on, "cum stagnis lie damms, inlairs et aquæductis, aliisque integris privilegiis et pertinentus ejusdem quibuscumque," and so on. The respondents found on the words

H. L. (Sc.) 1905

JOHN WHITE & SONS v. J. & M. WHITE.

Lord Robertson.

"cum stagnis lie damms" as embracing a grant of the water of this part of the river Kelvin. It would certainly be strange if so specific and so unusual a right were meant to be described or comprehended in the general plural expression stagnis, especially when the river Kelvin has, three lines before, been spoken of as a living river. It seems to me that the words in question, occurring as they do in the ordinary parlance of a grant of a Scottish mill, mean nothing more than that the disponee was to have such dams and such rights in those as pertained to the mill (whether in property or by subordinate right), and this construction is justified by the words "and other privileges" which almost immediately follow. They certainly cannot be construed as including a right of property in something essentially and juridically different from ordinary dams or stagna, as the plural is used of a word which in its ordinary sense applies to other things than rivers.

The title of 1897 (an ordinary disposition) gives the property as bounded by a red line, which excludes the river, but then it is added, "declaring, however, that the said red line, so far as bounding the said subjects hereby disponed along the river Kelvin, shall not limit or exclude our said disponees' right in and to the said river, so far as we have power to grant same, nor to the water and water power and dam from which said mill is supplied." It is superfluous to say that this does not advance the respondents' case; and it is substantially an echo of the Crown charter of 1738.

The view of the Lord Justice Clerk is that the Crown charter has made the respondents so completely masters of the situation that they can use the whole of the water if they require it, to the exclusion of the other riparian proprietors. His Lordship does not expressly describe this right as a right of property in the water; but there is no other theory suggested. Yet that theory is so repugnant to the general law of rivers that it is surprising that there is no discussion of this difficulty.

If, then, the titles do not support the respondents' claim, they have really no other case. The truth is that from time immemorial the respondents' mill was in use to abstract water from

the river to the extent of the capacity of the sluices of their existing mill; and, in law, they thus acquired a legal right by prescriptive use to continue that abstraction. This historical fact was crystallized (in the later titles, and in the pleadings in various actions) in the expression that they had the first water; and it having been ascertained that the amount per minute actually abstracted was 1200 cubic feet, that figure was stated as the amount of their rights. Here we are on the solid ground of a predial servitude by possession, and the rule is tantum prescriptum quantum possessum. In this region there is, of course, no room for the maxims about res meræ facultatis, which have been applied to rights constituted by grant. On the other hand, it is equally obvious that the conception of a mill as a growing concern, with expanding requirements, has no place in a discussion with other riparian proprietors about a servitude constituted by use; and the discussion of this topic by the learned judges is, of course, due to their holding the respondents to have a grant of the water of the river. Taking, as I do, the opposite view, I hold that the respondents have no right to abstract the water of this river except to the extent to which they have had prescriptive use. It follows that their present claim wholly fails.

In what has been said, no examination has been made of the rights of the appellants, and this seems to me entirely unnecessary to the argument. It happens that they, too, have abstracted water, and, like their opponents, seem to have acquired prescriptive right to do so, subject to the earlier and preferable right of the respondents which I have described. But the exact measure of the appellants' servitude rights seems to me immaterial to the present controversy. Their sufficient locus standi is as riparian proprietors, resisting encroachment on their common law interest in the river Kelvin.

I have only to add that the suggestion that the respondents can piece on the rights of the Slit Mill to the rights of the Old Mill was so completely refuted by the Solicitor-General for Scotland that it is unnecessary to refer to it.

I am clearly of opinion that the judgment ought to be reversed.

H. L. (Sc.) 1905 JOHN WHITE & SONS v. J. & M. WHITE.

LORD LINDLEY. My Lords, I am entirely of the same opinion. I have studied these judgments with care, and the judgment of the Lord Ordinary convinces me.

Ordered that the order appealed from be reversed; and that the respondents do pay to the appellants the costs both here and below.

Lords' Journals, December 15, 1905.

Agents for appellants: *Ingle Holmes, Sons & Pott, for Alex. Morison & Co., Edinburgh, for Donaldson & Alexander, Glasgow.*

Agent for respondents: *John Kennedy, W.S., for Macpherson & Mackay, Edinburgh, for Brown, Mair, Gemmell & Hislop, Glasgow.*

[HOUSE OF LORDS.]

H. L. (Sc.) 1905 *Dec.* 19.

CURTIS . . . . . APPELLANT;

AND

OLD MONKLAND CONSERVATIVE ASSOCIATION . . . . . RESPONDENTS.

Revenue—Income Tax—Unincorporated Association—Exemption—Income not exceeding 160*l.*—*Income Tax Act*, 1842 (5 & 6 *Vict. c.* 35), *ss.* 40, 163, 168, 192—*Finance Act*, 1894 (57 & 58 *Vict. c.* 30), *s.* 34.

An unincorporated association is not exempt from liability to the payment of income tax by reason of its income not exceeding 160*l.* a year.

APPEAL from a decision of the First Division of the Court of Session (as the Court of Exchequer), Scotland. (1)

The appellant was F. J. Curtis, surveyor of taxes for Coatbridge, Lanarkshire. The respondents were the Old Monkland Conservative Association, Coatbridge, and they were assessed to income tax under Sched. A for the year 1903—1904 in respect of 65*l.*, the annual value of the premises owned and occupied by them at Coatbridge.

(1) (1904) 7 F. 119.

They made an appeal to the General Commissioners of Income Tax claiming exemption, and the Commissioners having decided in their favour, a case was stated at the request of the appellant for the opinion of the Court of Session. In the result the Court of Session affirmed the determination of the Commissioners, hence the appeal to this House. The case stated found or admitted the following facts:—

(1.) The association was constituted under certain rules. (2.) The association is the owner and occupier of the premises at Nos. 20—22, Church Street, Glasgow. The premises are occupied by the association as reading and recreation rooms, offices, &c. (3.) The feu-duty (2*l.* 15*s.* 5*d.*) paid by the association for its premises, and the interest (31*l.*) paid by it on a bond over its premises, amount to 33*l.* 15*s.* 5*d.*, from which the association deducted income tax amounting to 1*l.* 10*s.* 11*d.* (4.) For the year of assessment the association had no excess of income over expenditure.

The association claimed total exemption from income tax (except in respect of the feu-duty and interest referred to in No. 3) for the year 1903—1904 on the ground that its income from all sources did not exceed 160*l.*, and in support of this claim, founded on the following enactments:—

(1.) The Income Tax Act, 1842 (5 & 6 Vict. c. 35), s. 163, which enacts: "That any person charged or chargeable to the duties granted by this Act either by assessment or by way of deduction from any rent, annuity, interest, or other annual payment to which he may be entitled, who shall prove before the Commissioners for general purposes in the manner hereinafter mentioned that the aggregate annual amount of his income, estimated according to the several rules and directions of this Act, is less than 150*l.*, shall be exempted from the said duties."

(2.) The Finance Act, 1894 (57 & 58 Vict. c. 30), s. 34, by which the foregoing exemption is extended to "persons whose respective incomes do not exceed 160*l.* a year."

(3.) Sect. 40 of the Income Tax Act, 1842, which enacts that "all bodies politic, corporate, or collegiate, companies, fraternities, fellowships or societies of persons whether corporate or not corporate, shall be chargeable with such and the like duties as

H. L. (Sc.) 1905 — CURTIS v. OLD MONKLAND CONSERVATIVE ASSOCIATION.

any person will under and by virtue of this Act be chargeable with."

(4.) By s. 192: "Wherever in this Act with reference to any person, matter, or thing, any word or words is or are used importing the singular number or the masculine gender only, yet such word or words shall be understood to include several persons as well as one person, females as well as males, bodies politic or corporate as well as individuals, and several matters or things as well as one matter or thing, unless it be otherwise specially provided, or there be something in the subject or context repugnant to such construction."

On behalf of the association it was contended that the constitution of the association was defined by and embraced in s. 40 of 5 & 6 Vict. c. 35, under which section it is therefore entitled to rank; and, alternatively, under s. 192 of said Act, it was further argued that s. 40 applied not only for the purpose of "charging" any body of persons, but also for the purpose of relieving them under s. 163 of the same Act, and that otherwise the word "wherever" at the opening of s. 192 would have to be wholly disregarded.

On behalf of the Crown (represented by the appellant) it was contended that s. 40 was a charging section; that s. 163 granted exemption to "any person" with a certain limited aggregate annual amount of income; that the words "any person" could not be held to include an association, as the wording of s. 163 was repugnant to such construction, and that the association was not a body politic or corporate. A club as a body, though a distinct entity, has no position recognized in law. It is not a company or a corporation, but an unincorporated society: per Day J., *Steele* v. *Gourley*. (1)

Dec. 11. *Sir R. B. Finlay, K.C.*, and *Scott Dickson, K.C.* (with them *A. J. Young*) (the second and third of the Scottish Bar), for the appellants. The decision of the Court of Session was erroneous. This association is not entitled to exemption. Sect. 40 of the Act of 1842, which enacts that all societies of persons, whether corporate or not corporate, shall be chargeable

(1) (1886) 3 T. L. R. 118.

with such and the like duties as any "person," has no reference to abatement. The exemption provided by s. 163 applies to "any person"; but that exemption does not extend beyond the persons charged as individuals. The expression "any person" does not extend to an unincorporated society, or even to several persons. There is an express provision as to the exemption of partners or joint tenants in s. 168. In fact the exemptions are not co-extensive with the charge.

Sect. 100, Sched. D, r. 3, relates to partnerships, and in anticipation refers to abatement. That section contemplates the assessment of the whole firm, and separate claims (s. 168) when the partners individually claim abatement. If the claim made by the respondents were treated as a claim by several persons their individual incomes would have to be taken into account in determining their right to exemption. The exemption is purely a personal exemption for the benefit of poor persons, but in the case of an association it cannot be brought within the view of the evil which the Legislature intended to remedy. Each individual who forms the association must get the exemption for himself if his income falls below 160*l.* The view that the treasurer of an unincorporated society is the person who is referred to in s. 163 as entitled to claim exemption is indefensible. He is the person bound to make a return, but he is not a person to be charged or chargeable within the meaning of s. 163, and he is in no way personally liable to pay the duty on behalf of the association.

[They cited *Mylam* v. *Market Harborough Advertiser Co.* (1)]

C. N. Johnston, K.C., and *R. S. Horne* (both of the Scottish Bar) (with them *H. W. Beveridge*), for the respondents. The income of the respondents being less than 160*l.* a year, they are entitled to exemption under s. 163 of the Act of 1842 and s. 34 of the Act of 1894. Since the respondents are made chargeable with income tax only by the operation of s. 40 of the Act of 1842, and since the section only makes them chargeable with such and the like duties as "any person," therefore where a "person" becomes exempt from duties, as he does in s. 163, the respondents will likewise be exempt. The respondents are

(1) [1905] 1 K. B. 708.

H. L. (Sc.) 1905 CURTIS v. OLD MONKLAND CONSERVATIVE ASSOCIATION.

in pari casu with a "person"; a "person" who is exempt is not chargeable. Sect. 192 declares that "person" in the Act "shall be understood to include several persons as well as one person." Therefore, s. 163 must be understood to include a group of several persons, such as the respondents' club, otherwise no meaning could be given to the definition laid down in s. 192. As to the case of *Mylam* v. *Market Harborough Advertiser Co.* (1), that was a company which paid dividends.

Sir R. B. Finlay, K.C., in reply.

The House took time for consideration.

Dec. 19. LORD ROBERTSON. My Lords, the section primarily and directly under construction is the 163rd of the Act of 1842; and it purports to confer an exemption upon persons. "Any person charged" is the recipient of the exemption. This, of course, carries us straight to the charging sections; and in that section, which hits the respondents, viz., s. 40, we find that, while societies (I use this term for shortness) meet the same fate as persons, the scheme of the section is to do this by express enactment, the section holding the two notions, of societies and persons, as antecedently separate and requiring enactment to bring about their identic treatment in the matter of charge.

In full view of this structure of this charging section, the exempting section, instead of either expressly applying both to persons and to the bodies which are charged in the same way as if they were persons, or adopting some neutral term common to both persons and societies, deliberately adopts one only of the two contrasted classes, and confers the exemption on "persons." It seems to me that this is decisive of the construction; that societies are purposely left out; and that the persons favoured are persons in the primary sense of the term—the same sense in which the word is used in the 40th section itself.

In this view the Act has not left the scope of the exemption to inference from a prima facie probability that the exemption would square (as regards the class affected) with the charge. But I am not sure, when the subject-matter is looked to, that

(1) [1905] 1 K. B. 708.

there is any such prima facie probability, for it is at least conceivable that the needs or poverty of the individual should be viewed in a different light from the needs and the poverty of a society. And this view is supported by the machinery provided for the individuals of, e.g., a partnership working out their own relief.

I am unable to think that the present question is affected or elucidated by those provisions which place on the officers of societies the duties in relation to the charge which, in the ordinary case, fall on the individual to be charged. And (to mention another argument relied on in the Court of Session) (1), the view of the 192nd section which makes "person" read as "persons" seems to prove too much. If it were sound, the charge on the Conservative Association is wrong, and the charge ought to have been made on the individual members of the association. I think the charge was rightly made on the association, and that the true question is whether the association is entitled to the exemption. I think it is not, and therefore I am for allowing the appeal, and I move accordingly.

Earl of Halsbury. My Lords, I have had an opportunity of reading the judgment which has been delivered by my noble and learned friend, Lord Robertson; and my noble and learned friend, Lord Lindley, and I both concur in what he has said, and we desire to add nothing.

Ordered that the order appealed from be reversed, and that the Crown (2) *do pay to the respondents the costs both here and below.*

Lords' Journals, December 19, 1905.

Agent for appellant: *Sir Francis C. Gore* (*Solicitor Inland Revenue*), *for Philip J. Hamilton Grierson* (*Solicitor Inland Revenue, Scotland*).

Agents for respondents: *A. & W. Beveridge, for Bishop, Milne, Boyd & Russell, Glasgow; and Gray & Handyside, Edinburgh.*

(1) 7 F. 119, at p. 122.

(2) This being a test case, the Crown agreed that the respondents should have their costs in any event.

[PRIVY COUNCIL.]

J. C.* 1904 Nov. 30; Dec. 5, 6. 1905 Dec. 4.

VAN DIEMEN'S LAND COMPANY . . . PLAINTIFFS;

AND

MARINE BOARD OF TABLE CAPE . . DEFENDANTS.

[TWO APPEALS CONSOLIDATED.]

ON APPEAL FROM THE SUPREME COURT OF TASMANIA.

Action of Trespass—Title to Foreshore under a Crown Grant—Construction—Improper Rejection of Evidence—Acts of User before the Grant admissible—Grant of Lands already in Possession of Grantee.

In an action against the respondents for a trespass by their agents on the foreshore, the appellants claimed that they were entitled thereto under a Crown grant in 1848 conveying to them lands of which prior to the grant they had taken possession and on which they had expended money; and the judge directed the jury that evidence of acts of user antecedent to the grant was inadmissible:—

Held, that the appellants were entitled to a new trial. Acts of user before the grant led up to and explained what was afterwards granted, and were cogent evidence of what was intended to pass thereby.

Held, further, that a direction to the effect that a lease granted by the appellants of part of a jetty extending over the foreshore was only evidence of an easement, not of the lessor's title to the land over which the structure was erected, was also calculated to mislead. It ought to have been to the effect that it was clearly evidence of seisin in the locus in quo.

APPEAL from an order of the Full Court (September 16, 1902) discharging a rule nisi to enter verdict for the appellants, and from another order of the same Court (November 25, 1902) discharging a rule nisi for a new trial on the grounds of misdirection and non-direction, and of improper rejection and admission of evidence, and on the ground that the verdict was against the weight of evidence.

The action was for a trespass to land under the circumstances stated in the judgment of their Lordships. It consisted of the erection of a wharf and retaining-wall for public purposes by the respondents.

* *Present:* THE LORD CHANCELLOR, LORD MACNAGHTEN, LORD ROBERTSON, LORD LINDLEY, and SIR FORD NORTH.

The question at issue was as to the construction and effect of a Crown grant to the appellants made in pursuance of 10 & 11 Vict. c. 57, and dated July 27, 1848, of lands in Tasmania, including 50,000 acres known as the Emu Bay block; the substantial point in controversy being whether the part of this block extended to high-water mark or to low-water mark on Emu Bay. The Government of Tasmania claimed the foreshore or land between high and low water marks as ungranted Crown land. The respondents in the exercise of statutory compulsory powers (see the Marine Boards Act, 1889), and with the approval of the Government, entered upon the foreshore in question and proceeded to exercise their statutory powers of constructing works thereon. The respondents' answer to the action was the denial of the appellants' title, the authority of the Government to take possession, and the statutory powers.

In the course of the trial the appellants contended:—

(1.) That upon the true construction of the grant of July 27, 1848, the title to the land the subject of the action was in the appellants; (2.) that evidence of user was admissible to explain the grant.

Under the second contention the appellants offered to prove their title to the locus in quo by evidence of certain acts of ownership exercised by them upon the seashore, shewing that the land between high and low water marks was parcel of the lands granted.

The appellants also set up a claim of title based upon (1.) a theory of lost grant; and (2.) the Nullum Tempus Act; involving in the latter case proof of sixty years' possession. The jury found against the appellants upon the facts necessary to support either claim.

Leave was granted to the appellants to move to enter a verdict in their favour on the ground that the grant of July 27, 1848, included the foreshore, the subject of the action. A rule nisi to that effect was discharged on the ground that the grant did not give to the appellants the foreshore of the several islands and blocks of land fronting on the sea which were comprised in it, and that its language was not capable of being construed so as to grant such foreshore.

J. C. 1905 — VAN DIEMEN'S LAND COMPANY v. TABLE CAPE MARINE BOARD.

Haldane, K.C., J. Eldon Bankes, K.C., and *H. B. Bompas*, for the appellants, contended that on the true construction of the deed of July 27, 1848, the foreshore in question was granted to them. The grant was capable by its terms of passing the foreshore. Having regard to its recital that the appellants were in possession of the lands intended to be thereby granted, and to the evidence given at the trial that they were also at and prior to the date of the grant in possession of the foreshore, the grant ought to have been construed as having passed the foreshore to them. The evidence shewed that both parties had treated the grant as operative for that purpose. Reference was made to Coulson and Forbes's Law of Waters, 2nd ed. p. 23; *Lord Advocate* v. *Young* (1); *Lord Advocate* v. *Wemyss* (2); *Lord Advocate* v. *Lord Blantyre* (3); *In re Belfast Dock Act* (4); *Healy* v. *Thorne* (5); *Brew* v. *Haren* (6); *Hamilton* v. *Attorney-General* (7); *Duke of Beaufort* v. *Mayor, &c., of Swansea* (8); *Calmady* v. *Rowe* (9); *Lord* v. *Commissioners for the City of Sydney* (10); *Jones* v. *Williams*. (11)

The grant being ex facie consistent with the intention that the foreshore should pass, evidence of acts of possession as explanatory of its terms was admissible, and also for the purpose of explaining any ambiguity however arising. See *Duke of Devonshire* v. *Pattinson* (12); *North Eastern Ry.* v. *Lord Hastings* (13); *Wadley* v. *Bayliss* (14); *Waterpark* v. *Fennell* (15); *Doe* v. *Wilson* (16); Chitty on Prerogative, pp. 391, 392; *King* v. *Forty-nine Casks of Brandy* (17); *Attorney-General* v. *Hanmer*. (18) If such evidence were admitted, title was established under the Nullum Tempus Act (9 Geo. 3, c. 16), for a sixty years' possession had been proved of the whole of the foreshore

(1) 12 App. Cas. 544, 553.
(2) [1900] A. C. 48.
(3) (1879) 4 A. C. 770, 789.
(4) (1867) Ir. Rep. 1 Eq. 128, 139, 143.
(5) (1870) Ir. Rep. 4 C. L. 495.
(6) (1874) Ir. Rep. 9 C. L. 29.
(7) (1880) L. R. (Ir.) 5 Ch. 555, 567, 572; S. C. (1881) 9 Ch. 271.
(8) (1849) 3 Ex. 413.
(9) (1844) 6 C. B. 861, 879.
(10) (1859) 12 Moo. P. C. 473.
(11) (1837) 2 M. & W. 326.
(12) (1887) 20 Q. B. D. 263.
(13) [1900] A. C. 260, 270.
(14) (1814) 5 Taunt. 752.
(15) (1859) 7 H. L. C. 650, 684.
(16) (1855) 10 Moo. P. C. 502.
(17) (1836) 3 Hagg. Adm. Rep. 257.
(18) (1858) 27 L. J. (Ch.) 837.

of the blocks and islands referred to by it, or, in the alternative, of the foreshore in front of Burnie, including the locus in quo. It was also contended that such evidence raised the presumption of a lost grant of the whole foreshore or at least of the portion in suit to the appellants. Reference was also made to *Tuthill* v. *Rogers* (1); *Powell* v. *Hepburn* (a case decided by the Tasmanian Supreme Court in 1889, unreported).

Asquith, K.C., Dobbie, K.C. (Solicitor-General of Tasmania), and *Vaughan Hawkins*, for the respondents, contended that the verdict and judgment were right. Prima facie the foreshore in suit belonged to the Crown, and its title could only be displaced by a valid grant conveying it to the appellants in clear and unambiguous terms; or by an ancient grant, ambiguous in its terms, if they were cleared up and explained favourably to the appellants by evidence of continuous user and acts of ownership thereunder; or by sixty years' adverse possession under the Nullum Tempus Act. As regards the first point, it was contended that on the true construction of the deed of 1848, the grant of the Emu Bay block extended to high-water mark and no further, and did not purport to grant the foreshore. The appellants' case on this point rests upon the general words of the grant; and mere general words are insufficient, and cannot pass the foreshore. If it did purport to do so, it was contended that, having regard to the terms of 10 & 11 Vict. c. 57, it was ultra vires and void. Upon the second point it was contended that evidence of user was inadmissible to explain the grant. The grant was not an ancient grant, such as, if ambiguous, might be explained by evidence of user. It was not ambiguous in its terms, but clearly excluded the foreshore. To render evidence of user admissible, in order to shew to what the grant extends, the conditions are that the grant is ancient and ambiguous in its language, leaving it in doubt whether a particular place is or is not included in it. Where the grant by its terms excludes it, they cannot be varied by parol evidence. With regard to the third point, it was contended that the appellants were not entitled to rely on adverse possession, since such a claim would be in

(1) (1844) 1 Jones & Lat. 34.

J. C.
1905
VAN DIEMEN'S LAND COMPANY v. TABLE CAPE MARINE BOARD.

contradiction to their grant. If they were, it was not proved. Evidence before the date of the grant was inadmissible, or could not be reasonably put to the jury. The theory of a lost grant was negatived by the language of the existing grant, which was the foundation of the action; and the claim under the Nullum Tempus Act was not supported by the evidence. Besides the cases cited on the other side, many of which were discussed, reference was also made to *Parmeter* v. *Sir Vicary Gibbs* (1); *Attorney-General* v. *Trustees of British Museum* (2); Hall on Seashore, 2nd ed. pp. 17, 18, pointing out that the presumption is that the high-water mark is the sea boundary; *Smith* v. *Earl of Stair* (3); Moore on Foreshore, 3rd ed. p. 555; where there is mention of *Attorney-General* v. *Portsmouth* (4); *Mellor* v. *Walmesley*. (5)

Haldane, K.C., replied.

1905
Dec. 4.

The judgment of their Lordships was delivered by

EARL OF HALSBURY L.C. The action out of which these appeals arise was an action of trespass practically to try the right to a part of the foreshore of Emu Bay, in Bass's Straits. Their Lordships are not able to acquiesce in the suggestion that the decision of this case has so wide and important a result as some of the learned judges seem to have supposed. Nevertheless, it is of course important to the parties in its immediate result and the consequences which follow from them.

The facts which lead up to the question in debate may be shortly summarized. An Act of Parliament was passed in the sixth year of King George IV. (6 Geo. 4, c. 39) for the purpose of encouraging the cultivation of waste lands in what was then the penal colony of Van Diemen's Land. It contemplated the granting of a charter to certain persons, and the appellant company was accordingly incorporated by charter dated November 10, 1825. Subsequent legislation (10 & 11 Vict. c. 57) having authorized the grant to the company of tracts of land, the real question now in debate is whether the locus in quo of the

(1) (1822) 10 Price, 412.
(2) [1903] 2 Ch. 598, 613.
(3) (1849) 6 Bell's A. C. 487.
(4) (1877) 25 W. R. 559.
(5) [1904] 2 Ch. 525.

alleged trespass is included in a grant, dated July 27, 1848, made in pursuance of that legislation.

The action was tried before Clark J. and a jury at Launceston, in Tasmania, and a verdict was found for the defendants, the present respondents. The argument appears to have wandered over a very wide field, but the direction of the learned judge to the jury, which must have had great weight with them, was that the acts of user proved to have taken place over the locus in quo were of no importance, and, in fact, were not evidence at all, since they were acts which were antecedent in date to any grant made by the Crown. To understand the relevancy and importance of this direction it is only necessary to observe that both the Act 10 & 11 Vict. c. 57 and the subsequent grant recite that the company had taken possession of the lands intended to be granted and incurred expense in the improvement thereof, and the grant is assumed to be of such a character that it neither expressly excludes nor expressly includes the locus in quo. It can hardly be doubted, in view of the recital to which reference has been made, that it was intended to authorize by the statute of Victoria the granting of a title to the company of lands of which they had taken possession, and upon which they had expended money; neither can it be doubted that the grant itself, when made, was intended to confer a title to what the company had taken possession of, and so far from not being evidence, their Lordships consider user was very cogent evidence of what was intended to be granted. It certainly was not evidence, as the learned judge points out, of possession against the Crown, neither was it evidence of a lost grant. The learned judge very satisfactorily disposes of both these suggestions, but it is difficult to understand why it was not evidence to identify the place the title of which the Crown intended to confirm to the company.

It is quite true that if the language of the grant itself were absolutely plain and unambiguous, no amount of user would prevail against the plain meaning of the words: see *North Eastern Ry. Co.* v. *Hastings.* (1) It is, however, impossible to contend that the language of this instrument can be so represented. The language is very wide, but when one finds such a

(1) [1900] A. C. 260.

J. C. 1905 VAN DIEMEN'S LAND COMPANY v. TABLE CAPE MARINE BOARD.

recital as this: "the company have been authorized to take possession of several portions of land, and have ever since been and now continue in possession thereof, but no grant thereof has been made to the Land Company": when these are the circumstances under which the grant is actually made—why is it not evidence, and cogent evidence, when the taking possession of the particular piece of land is proved, and the continuance in possession before and after the grant is proved? The time when, and the circumstances under which, an instrument is made, supply the best and surest mode of expounding it, and when the obvious intention is to give a title to what has been taken and retained before the actual grant, it is manifest that what has been so taken and retained is cogent evidence of what is granted. When evidence of this character has been practically withdrawn from the jury, it is impossible to allow the verdict thus obtained to stand.

The circumstances under which modern user may be proved to explain a written instrument are treated of with great precision by the learned judges who advised the House of Lords in *Waterpark* v. *Fennell*. (1)

The learned judge stated, and stated quite correctly, that you cannot say that acts of user were acts of user under a grant when they were done before the grant existed. It does not follow that such acts were not relevant to be proved when, as in this case, they lead up to and explain what is afterwards granted.

It would be a singular application of the maxim quoted by Coke, 2 Institutes, 11, contemporanea expositio est fortissima in lege, to suggest that the proof of user must be confined to ancient documents, whatever the word "ancient" may be supposed to involve. The reason why the word is relied on is because the user is supposed to have continued, and thus to have brought us back to the contemporaneous exposition of the deed.

The contemporaneous exposition is not confined to user under the deed. All circumstances which can tend to shew the intentions of the parties whether before or after the execution of the deed itself may be relevant, and in this case their Lordships think are very relevant to the questions in debate.

(1) 7 H. L. C. 650.

Another direction given by the learned judge to the jury and calculated to mislead them was his direction in relation to the leases of some part of the land in question. He suggested, not very obscurely, that the lease of part of the jetty which was leased and which extended over the foreshore was only evidence of an easement, and that the lessor of such a structure need not own the land over which such a structure was erected. That such a division might in point of law exist is nothing to the purpose. There was no evidence of any such severance of interest, and the effect of such an observation was well calculated to mislead the jury, who ought to have been told that such evidence was clearly evidence of seisin in the locus in quo.

Their Lordships do not think it desirable, as this case is to be tried again, to deal more minutely with the facts of the case, though they think it right to say that, as to the question of lost grant, or possession against the Crown, they would have been prepared to affirm the judgments under appeal; but, reluctant as they have been to order a new trial where so much time has been spent and expense incurred already, and where so much learning and care have been bestowed upon the argument, they are unable to say that the question has been properly left to the jury. They will accordingly humbly advise His Majesty that the judgments of the Supreme Court ought to be discharged, and that there should be a new trial, and that the costs in the Supreme Court ought to abide the result of the new trial. The respondents will pay to the appellants the costs of these appeals.

Solicitors for appellants: *Bompas, Bischoff, Dodgson, Cox & Bompas.*

Solicitors for respondents: *Bircham & Co.*

[PRIVY COUNCIL.]

J. C.* 1905

July 7; Nov. 14

MONTREAL STREET RAILWAY COMPANY . DEFENDANTS;

AND

CITY OF MONTREAL . . . . . PLAINTIFFS

ON APPEAL FROM THE SUPREME COURT OF CANADA.

Construction of Contract—"Whole Operation of its Railway"—Limits to whole Operation—Civil Code of Lower Canada, Art. 1018.

By art. 1018 of the Civil Code of Lower Canada, "all the clauses of a contract are interpreted the one by the other, giving to each the meaning derived from the entire act."

The appellant company having contracted with the respondent city to pay annually certain specified percentages on the total amount of their gross earnings arising from the whole operation of their railway, and it appearing from the rest of the contract that the city considered territories of outside municipalities were not included within its scope, and that it could only deal with streets within its jurisdiction, and that the company had to make separate arrangements with outside municipalities in respect of the operation of the railway within their limits:—

Held, that by the true construction of the contract the city was only entitled to percentages on the gross earnings arising from the whole operation of the lines within its own limits.

APPEAL by special leave from a decree of the Supreme Court (March 25, 1904) reversing a decree of the Court of King's Bench (January 20, 1903) which affirmed Davidson J.'s dismissal of the action.

The question decided was whether by the true construction of their contract with the city the railway company were liable to pay percentages on their earnings from the whole operation of their railway, or whether the claim of the city was restricted to percentages on earnings within the limits of the city.

The two first Courts held that it was so restricted. The Supreme Court held that, taking all the terms of the contract together (which is set out in their Lordships' judgment), the company were bound to pay a percentage on the whole amount of the gross earnings derived from their whole system.

* *Present:* LORD DAVEY, LORD JAMES OF HEREFORD, LORD ROBERTSON, and SIR ANDREW SCOBLE.

C. S. Campbell, K.C., and *Tyrrell Paine*, for the appellants, contended in favour of the restriction within the limits of the city. The franchise given by the contract related to the railway within those limits; and there was nothing in the contract which indicated that the railway the subject of the contract was to extend outside the limits. The contract, moreover, was silent as to percentages on earnings outside those limits.

Atwater, K.C., and *Ethier, K.C.*, for the respondents, contended that the appellant was bound by the true construction of the contract to pay in respect of the whole operation of the railway whether within or without the limits of the city. There was nothing unreasonable in their doing so, for the chief value of the entire system was derived from the privileges and franchises which they had obtained from the city.

Campbell, K.C., replied.

The judgment of their Lordships was delivered by

SIR ANDREW SCOBLE. The main question in this appeal is whether the city of Montreal is entitled, under its contract with the Montreal Street Railway Company, to claim percentages upon the gross earnings arising from the whole operation of its railway, whether within or without the limits of the city of Montreal, or whether such percentages are payable only in respect of such earnings as arise from the operation of its railway within the limits of the city.

The contract was authorized by the city authorities by "By-law No. 210, concerning the establishment and operation of an electric passenger railway in the city of Montreal by the Montreal Street Railway Company," which was accepted by the company on December 28, 1892. The contract itself was executed by the parties on March 8, 1893. At the time of its execution the company had in operation a railway worked by horse traction, situate in the city, with short extensions into some of the adjacent municipalities.

The article of the contract relating to the payment of percentages is art. 36, and is in these terms: "The company shall pay to the city annually, from September 1, 1892, upon the total amount of its gross earnings arising from the whole operation

J. C. 1905 MONTREAL STREET RAILWAY v. MONTREAL CITY.

of its said railway, either with cars propelled by electricity or with cars drawn by horses," certain specified percentages. The reason for including both methods of traction or propulsion by horses or by electricity, is stated to be that the change from horse power to electric power was necessarily to be gradual, and might, under art. 15 of the contract, possibly not be completed until September 1, 1895.

The question which their Lordships have to determine is what is meant by the phrase, "its said railway," and upon this point the Courts in Canada have arrived at different conclusions. Davidson J., who heard the case in the Superior Court, in the first instance, held that the percentage was limited to the earnings of the railway in the city, and upon appeal to the Court of King's Bench his decision was affirmed by a majority of three to two. But upon appeal to the Supreme Court of Canada, the judgment of the Court of King's Bench was reversed by a similar majority of three to two. There were thus six judges in favour of the one view, and five of a contrary opinion. Under these circumstances their Lordships had no hesitation in humbly advising His Majesty to allow special leave to appeal to the King in Council.

The law applicable to the construction of this contract is thus expressed in art. 1018 of the Civil Code of Lower Canada: "All the clauses of a contract are interpreted the one by the other, giving to each the meaning derived from the entire act." (1) Regarded in this light, the contract is for the establishment and operation of an electric passenger railway in the city of Montreal. Art. 1 provides that "the Montreal Street Railway Company shall establish and operate, subject to the conditions hereinafter mentioned, lines of railway for the conveyance of passengers in the city by means of cars propelled by electricity, in the streets hereinafter mentioned, and in all other streets which may hereafter be determined by the council of the city of Montreal." Art. 12 provides that "the *tracé* of routes in the different streets of the city, as well as the establishment and

(1) In the French text: "Toutes les clauses d'un contrat s'interprètent les unes par les autres, en donnant à chacune le sens qui résulte de l'acte entier."

transfer connections, shall be made and shall remain under control of the city council. Until further orders the cars shall run in the streets mentioned in the schedule of routes hereinbelow indicated." This schedule is given in art. 46, and enumerates nineteen routes, all of which are in the city, and many of which purport to run "from the eastern city limits" to "the western limits of the city of Montreal." As regards the privileges conferred on the company with regard to the use of electric power in the streets, the right to open the streets, and so forth, the city could only deal with the streets within its jurisdiction; nor had it power to regulate times and fares beyond its own limits. Every outside municipality, into whose area the company might desire to extend its operations, had independent powers in these respects, and with them the company had to make separate arrangements. Indeed, the only reference in the contract to areas outside the limits of the city is contained in art. 44, which provides that "in the case of annexation by the city of any of the outside municipalities, the company shall be obliged, within three months after being ordered by the council, to extend their system through that new annexed portion of territory not already provided with electric cars, and to furnish a similar service as is furnished to the city." No such annexation, their Lordships are informed, has taken place, but the insertion of this provision is a clear indication that the city considered that the territories of outside municipalities were not included in the scope of the contract.

Looking at the contract as a whole, it appears to their Lordships that the lines of railway contemplated by it were, as defined in art. 1, "lines of railway for the conveyance of passengers in the city," and that the expressions "the said railway," "the said railway tracks," and "its said railway," wherever they occur in the contract, must be taken to refer to the lines within the limits of the city. The percentages, therefore, claimable by the city, are only upon the gross earnings arising from the whole operation of the lines within those limits.

It is true, as pointed out by some of the learned judges in the Courts below, that art. 37 of the contract requires the company

J. C. 1905 MONTREAL STREET RAILWAY v. MONTREAL CITY.

to "render quarterly a true and just account and statement in writing of the whole of their gross earnings, and allow proper inspection of all books, accounts, returns, and vouchers for the purpose of checking and verifying such accounts by the city treasurer, city auditor, or other accountant appointed by the city council;" and it was held by Girouard J. that this clause was "clearly intended to give an indisputable effect to clause 36, and to permit the city to collect without trouble or question its proportion of the gross earnings of the railway." But their Lordships are of opinion that clauses 36 and 37 must be read together, and, when so read, lead to no such conclusion. Some of the earnings of the company arose from traffic which began and ended within the limits of the city; but another, and possibly a greater, part was derived from traffic which originated in the city and terminated in the suburbs, or originated in the suburbs and terminated in the city. For all traffic attributable to the operation of the railway in the city, wherever it originated or terminated, the company was accountable. The accounts of the whole earnings had, therefore, to be submitted and checked, in order that the proper percentage payable to the city might be ascertained and verified.

A second question discussed in the local Courts was as to the method on which the accounts between the city and the company had been adjusted. From the nature of the case, it was impossible to separate the earnings inside from those outside the city, with anything approaching mathematical accuracy; and accordingly the judge of first instance, by an order of November 19, 1898, very properly referred it to two experts, one of whom was the treasurer of the city of Montreal and the other the comptroller of the Canadian Pacific Railway Company, to examine into the method of calculation to be adopted in order to secure a just apportionment. These gentlemen reported that "after considering divers other methods by which such apportionment might be arrived at," they were of opinion "that the system now pursued by the Montreal Street Railway Company is the most practical one and in its operation just, but that if any change were to be made it would be to increase the earnings per

car mile in favour of the outside districts." The learned Judge adopted their report, and it was confirmed by the judgment of the majority of the Court of King's Bench. Their Lordships see no reason to dissent from this conclusion.

Their Lordships will humbly advise His Majesty that this appeal ought to be allowed, and the judgment of the Supreme Court reversed with costs, and that of the Court of King's Bench confirmed. The respondents must pay the costs of the appeal.

J. C. 1905 MONTREAL STREET RAILWAY v. MONTREAL CITY.

Solicitors for the appellants: *Paines, Blyth & Huxtable.*
Solicitors for the respondents: *Blake & Redden.*

[PRIVY COUNCIL.]

MAYOR, COUNCILLORS, AND CITIZENS OF HAWTHORN . . . . . } DEFENDANTS;

AND

KANNULUIK . . . . . PLAINTIFF.

J. C.* 1905 *July* 18, 19; *Nov.* 7.

ON APPEAL FROM THE SUPREME COURT OF VICTORIA.

Construction of Drain—Negligence—Liability of Municipal Authorities—Exercise of Statutory Powers.

Where municipal authorities under their statutory powers took over the care of a watercourse and made it into a public drain, which proved in course of time to be increasingly insufficient to hold and pass on the mixture of slime and sewage poured into it, with the result that the plaintiff's property was flooded thereby:—

Held, that they were liable for negligence, notwithstanding that the drain when first formed was sufficient for its purpose.

APPEAL from a decree of the Full Court (October 14, 1903) affirming a judgment of Williams J. (April 9, 1903).

The appellants are a municipality constituted under the Victoria Local Government Act, 1890 (54 Vict. No. 1112), or corresponding prior enactments, and have thereunder the control and management of all drains within the district.

* *Present:* LORD MACNAGHTEN, LORD DAVEY, LORD JAMES OF HEREFORD, and SIR ARTHUR WILSON.

J. C. 1905 — HAWTHORN CORPORATION v. KANNULUIK.

The action was for trespass occasioned by the overflowing of a main and other drains constructed by the defendants, or alternatively for compensation under the said Acts. The defendants pleaded that the facts alleged did not constitute negligence in law or were not such as would give rise to a cause of action, that they had not acted mala fide, and that there was no right to compensation under the Acts in question.

Williams J. found that there had been negligence in the planning of the original drains, and in the construction from time to time of contributory channels, and assessed the damages at 250*l.*

The Full Court affirmed this judgment.

Danckwerts, K.C., and *M. L. Romer* for the appellants, after contending that the finding was against the weight of evidence, submitted that they were not liable for the insufficiency of a watercourse, which they had not constructed, but had only repaired. They had acted bona fide, had not violated any legal rights of the respondent, and were not liable under their statute or otherwise for non-feasance. The respondent could not hold them responsible for not putting in force their compulsory powers in order to remedy the existing drainage of the district. They referred to *Glossop* v. *Heston and Isleworth Local Board* (1); *Attorney-General* v. *Guardians of Dorking* (2); *Carslake* v. *President, &c., of Caulfield* (3); *Mayor, &c., of E. Freemantle* v. *Annois* (4); *President, &c., of Colac* v. *Summerfield* (5); *Brierley Hill Local Board* v. *Pearsall* (6); *Sanitary Commissioners of Gibraltar* v. *Orfila* (7); *Municipal Council of Sydney* v. *Bourke* (8); *Cowley* v. *Newmarket Local Board* (9); *Southwark and Vauxhall Water Co.* v. *Wandsworth Board of Works.* (10)

Hugo Young, K.C., and *W. O. Hodges*, for the respondent, contended that the appellants had caused or allowed the overflow complained of, and were liable for trespass. They were not authorized by their acts to cast drainage on the respondent's

(1) (1879) 12 Ch. D. 102.
(2) (1882) 20 Ch. D. 595.
(3) (1891) 17 Vict. L. R. 560.
(4) [1902] A. C. 213.
(5) [1893] A. C. 187.
(6) (1884) 9 App. Cas. 595.
(7) (1890) 15 App. Cas. 400.
(8) [1895] A. C. 433.
(9) [1892] A. C. 345.
(10) [1898] 2 Ch. 603, 610.

land; and by so doing they committed a nuisance whereby the respondent's lands and goods were damaged. They were guilty also of negligence (1.) in the original construction of the drain, (2.) in the subsequent construction of the tributary drains and other works. They referred to s. 454 of the Act of 1890; *London and Brighton Ry. Co.* v. *Truman* (1); *Curry* v. *President, &c., of Benalla* (2); *Mayor, &c., of E. Freemantle* v. *Annois.* (3) The appellants must exercise their statutory powers without negligence and sufficiently for their purpose: *Metropolitan Asylum District* v. *Hill* (4); *Canadian Pacific Ry.* v. *Parke* (5); *Geddis* v. *Bann Reservoir* (6); *President, &c., of Colac* v. *Summerfield* (7); *Croysdale* v. *Sunbury-on-Thames Urban District Council.* (8)

Danckwerts, K.C., replied.

The judgment of their Lordships was delivered by

LORD MACNAGHTEN. The conduit in the city of Hawthorn, which is now known as the "main drain" and for the most part is an open sewer, was formerly a natural watercourse receiving and carrying off nothing but the surplus storm-water of a hilly district about five hundred acres in extent. This district or drainage area, as it may be termed, has been divided between the municipalities of Hawthorn, Kew, and Boroondara. Hawthorn has about half. The rest is comprised within the limits of the other two municipalities in nearly equal proportions. Kew on the north and Boroondara on the north-east and east are at rather a higher level and naturally drain through Hawthorn.

In 1888 the plaintiff Jaan Kannuluik purchased a plot of ground abutting on the watercourse at its lowest point in Hawthorn just where it turns to the south with a sharp bend after passing under Auburn Road. From a contour plan of the drainage area it appears that the fall to this point is not less than 140 feet.

(1) (1885) 11 App. Cas. 45.
(2) (1895) 21 Vict. L. R. 159.
(3) [1902] A. C. 213.
(4) (1881) 6 App. Cas. 193.
(5) [1899] A. C. 535.
(6) (1878) 3 App. Cas. 430.
(7) [1893] A. C. 187.
(8) [1898] 2 Ch. 515.

J. C. 1905

HAWTHORN CORPORATION v. KANNULUIK.

In 1889 the municipal authorities of Hawthorn under their statutory powers took over the care and management of this watercourse and made it into a public drain. They spent a good deal of money upon it in the way of improvement at intervals down to the year 1896. The work was done in sections. The section adjoining Kannuluik's property was pitched and finished in 1889. A number of subsidiary channels have since been made by the municipal authorities of Hawthorn, or with their permission, for the purpose of running off the storm-water and sewage into the main drain. The result is that the water and sewage from the upper parts of Hawthorn and from the parts of Kew and Boroondara which drain through Hawthorn are concentrated and poured into the main drain with great violence. When there is heavy rain the rush of water is so great and so sudden that the channel becomes choked. There is an overflow, and when the flood subsides, the low-lying lands, and Mr. Kannuluik's premises in particular, the ground-floor of his dwelling-house and the surface of his garden, are covered with an offensive mixture of sewage and slime.

After several ineffectual complaints Mr. Kannuluik brought this action against the municipality of Hawthorn. The case was tried by Williams J., without a jury. It occupied no less than seven days. The learned judge found in favour of the plaintiff and assessed the damages at 250*l*.

On appeal the Full Court affirmed the judgment of Williams J., but not altogether upon the same grounds. The learned judge who tried the case relied principally, though not entirely, on faulty construction in 1889. In the Full Court, where the leading judgment was given by Holroyd J., the decision turned rather on the subsequent acts and conduct of the municipal authorities.

Their Lordships agree with Holroyd J. The case seems to be a very simple one. The only question is, have the municipal authorities acted negligently so as to do unnecessary damage to Mr. Kannuluik?

As for negligence, it is difficult to imagine a more conspicuous example of negligence than is shewn by repeatedly pouring offensive stuff into a receptacle or channel proved over and over

again to be insufficient to hold it and pass it on. The municipal authorities might just as well pour this stuff directly on the plaintiff's land. The damage to the plaintiff cannot be denied. It is nothing to the purpose, even if it be true, to say that the property in the plaintiff's hands and in the hands of his predecessors in title, was often flooded before the municipal authorities turned the watercourse into a public drain. Nor is it enough to prove that the work done in 1889 was sufficient at the time. It is insufficient now. It has been insufficient for some time past. The mischief grows as building increases, as new roads are made, new channels formed, and more and more of the surface becomes impervious to rainfall. It is not suggested that there is any real difficulty in remedying the mischief. Indeed, if the evidence of the surveyors called on behalf of the plaintiff may be trusted, the matter can be set right at a very trifling cost.

Their Lordships will humbly advise His Majesty that the appeal ought to be dismissed.

The appellants will pay the costs of the appeal.

Solicitors for appellants: *Roy & Cartwright.*
Solicitors for respondent: *Lee, Ockerby & Everington.*

[PRIVY COUNCIL.]

J. C.* 1905 July 19, 25; Nov. 9.

SAUNBY . . . . . PLAINTIFF;

AND

WATER COMMISSIONERS OF THE CITY OF LONDON AND THE CORPORATION OF THE CITY OF LONDON (ONTARIO) . DEFENDANTS.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Ontario Act, 36 *Vict.* c. 102, *s.* 5—*Action for Trespass—Injunction—Arbitration Clauses—Remedy by Action—Failure of Company to proceed under their Act.*

In an action for trespass on the appellant's land and interference with his water rights, the respondents pleaded that they were authorized thereunto by their incorporating Act (36 Vict. c. 102, Ontario), and that the appellant's remedy (if any) was to proceed by arbitration under the Act:—

Held, that according to the true construction of s. 5 the arbitration clauses only come into operation on disagreement as to the amount of purchase-money, value, or damages arising after definite notice of expropriation and treaty or tender relative thereto; and that as the respondents had not proceeded in accordance with the directions of their Act, the appellant had not lost his remedy by action.

An injunction was rightly granted in this case, but its effect will cease on the respondents proceeding to expropriate in the manner directed by their Act.

APPEAL by special leave from a decree of the Supreme Court (April 27, 1904), reversing a decree of the Court of Appeal for Ontario (September 14, 1903), which had affirmed a judgment of the trial judge (August 28, 1902).

The action was for damages for a trespass and an injunction as stated in their Lordships' judgment. The respondents denied the damages and pleaded (inter alia) that they had acted as they were authorized to do by certain Acts of the Ontario Legislature, and that the appellant's claim was barred by certain of its provisions. There were concurrent findings that the appellant had suffered damage both as a riparian proprietor and a millowner.

* *Present:* LORD MACNAGHTEN, LORD DAVEY, LORD JAMES OF HEREFORD, and SIR ARTHUR WILSON.

The question of law on which there had been divergence of judicial opinion was whether, under Ontario Act, 36 Vict. c. 102, and its amending Act, 41 Vict. c. 27, the respondents were authorized to do the acts complained of without being liable to this action.

Upon this point the trial judge, unanimously affirmed by the Court of Appeal, held that s. 5 of the earlier Act was not applicable so as to restrict the appellant to remedy by arbitration. The Supreme Court, by a majority of three to two, held that the appellant was so restricted and that his action did not lie.

Hellmuth, K.C., and *C. A. Ivey*, for the appellant, contended, on the question of law, that assuming the respondents were authorized under their Acts to appropriate the appellant's land and water privilege, they could only exercise the right so conferred in compliance with the conditions precedent therein laid down. It was not alleged that the Water Commissioners had ever taken any steps to acquire, either by purchase under contract or by compulsory methods, the said land and water privilege. Nor had they taken any of the preliminary steps prescribed by s. 5 of the principal Act, or made any application to procure possession thereof under s. 12 of the amending Act. Nor have any lands or privileges of the appellant been ascertained or appropriated by the Water Commissioners so that the same might be vested in the city of London under s. 6 of the principal Act. Until the respondents had proceeded under their Acts, they remained liable in an ordinary action for trespass, and could not claim that the remedy under the Act had arisen and had superseded the remedy by the ordinary law. They referred to *Corporation of Parkdale* v. *West* (1); *North Shore Ry. Co.* v. *Pion* (2); *Herron* v. *Rathmines and Rathgar Improvement Commissioners* (3); *Canadian Pacific Ry. Co.* v. *Parke* (4); *Western Counties Ry. Co.* v. *Windsor and Annapolis Ry. Co.* (5); *Caldwell* v. *Maclaren.* (6)

Aylesworth, K.C., for the respondents, contended that the appellant's remedy was by arbitration. The appropriation

(1) (1887) 12 App. Cas. 602.
(2) (1889) 14 App. Cas. 612.
(3) [1892] A. C. 498, 523.
(4) [1899] A. C. 535.
(5) (1882) 7 App. Cas. 178, 189.
(6) (1884) 9 App. Cas. 392.

J. C. 1905 SAUNBY v. LONDON (ONT.) WATER COMMISSIONERS.

complained of is in express terms authorized by s. 5 of the principal Act, and the remedy by arbitration is prescribed as the sole machinery by means of which the expropriated owner may obtain compensation, in the absence of agreement with the Water Commissioners. They referred to *Rameshur Pershad Narain Singh* v. *Koonj Behari Pattuk.* (1) This is not a case for injunction : *Shelfer* v. *City of London Electric Lighting Co.* (2) ; *Chapman* v. *Guardians of Auckland Union* (3) ; *Corporation of Parkdale* v. *West.* (4) Even if the appellant's remedy were by action and not by arbitration, this action cannot be maintained in the absence of any notice of action : see London Waterworks Act, 1873, s. 17, and Consolidated Statutes of Upper Canada, c. 126, s. 10. Also under s. 31 of the Act of 1873 it is barred by limitation, or at least restricted to damages suffered within the six months next preceding action brought.

Counsel for the appellant were not heard in reply.

1905 *Nov.* 9.

The judgment of their Lordships was delivered by

LORD DAVEY. The appellant is the owner and occupier of lands adjoining the river Thames in the province of Ontario, and of a water mill operated by water from that river. He complains in this action that the respondents by the erection of a dam with flash boards across the river Thames at a point some miles below the appellant's mill have penned back the water in the river, with the result that in certain seasons of the year his lands are flooded, and the water power of his mill is interfered with. There is no serious dispute that the appellant has in fact been injured by the respondents' works, and if this were all his right of action would be clear. But the respondents, the Water Commissioners, who are incorporated by a provincial Act (36 Vict. c. 102, Ontario) for supplying the City of London with pure water, contend at their Lordships' Bar that they are authorized by their Act to execute the works complained of, and the appellant's remedy (if any) is to proceed by arbitration for damages under the provisions of the Act.

The action was commenced on August 19, 1897, in the High

(1) (1878) 4 App. Cas. 121.
(2) [1895] 1 Ch. 287
(3) (1889) 23 Q. B. D. 294.
(4) 12 App. Cas. 602.

Court of Ontario. Both the respondents were made defendants, but the Water Commissioners are the party really interested, and will alone be referred to as the respondents. The appellant's claim was for damages, and an injunction against the continuance of the wrongful acts complained of, and a mandatory order directing the defendants to remove the dam and flash boards. After the case was opened a reference was by consent made by the Court to two engineers agreed upon by the parties to report upon the facts of the case, and to ascertain and report the extent of the damage (if any) the appellant suffered by reason of the said dam and flash boards. The referees made a detailed report dated October 19, 1901. In the result they found that the appellant had suffered material injury both to his riparian rights and his rights as a millowner. They also found that the amount of damages to the mill would vary between $440 and $240 per annum, according to the view which should be taken as to certain questions not material for the present purpose.

By the decree of the Chief Justice of the King's Bench Division, dated August 28, 1902, judgment was ordered to be entered for the appellant with a reference as to damages confined to six years before the commencement of the action, and an injunction was granted to restrain the respondents from penning and forcing back the water in the river Thames so as to damage or injure the appellant in any of his riparian rights as owner of the lands mentioned, or so as to prevent the water flowing away from the mill of the appellant as such water otherwise would but for such penning and forcing back.

An appeal by the respondents from this decree was dismissed by the unanimous judgment of the learned judges of the Court of Appeal.

The respondents then appealed to the Supreme Court of Canada, and that Court by a majority of three to two reversed the previous judgments, and by an order of the Court dated April 27, 1904, the action was ordered to be dismissed with costs. The present appeal is from the last-mentioned order.

The majority of the learned judges thought it was within the powers of the respondents given to them by their Act to appropriate the water in the river by the formation of their dam on paying

J. C. 1905

SAUNBY v. LONDON (ONT.) WATER COMMISSIONERS.

damages for such appropriation, and the proper remedy of the appellant was to apply for a mandamus in order to have the amount of such damages determined by arbitration in accordance with the 5th section of the Act. The minority, on the other hand, thought that the respondents had not taken the proper preliminary steps for the purpose of appropriating the appellant's land and water rights, and that the arbitration clauses of the Act were therefore inapplicable, and the appellant was entitled to an injunction to restrain what they held to be an unauthorized trespass.

The difference between the learned judges, therefore, really depends on the proper construction of the 5th section of the respondents' Act. By that section the Commissioners are authorized to enter into the lands of any person within fifteen miles of the city of London, and to survey, set out, and ascertain such parts thereof as they may require for the purposes of their waterworks, and also to divert and appropriate any river, pond, spring, or stream of water as they shall judge suitable and proper, and to contract with the owner or occupier of the said lands, and those having a right in the said water for the purchase thereof or of any privilege that might be required for the purposes of the Commissioners, and in case of any disagreement between the Commissioners and the owners or occupiers of such lands, or any person having an interest in the said water or the natural flow thereof, or any such privilege as aforesaid respecting the amount of purchase or value thereof, or as to the damage such appropriations should cause to them or otherwise, it was provided that the same should be decided by three arbitrators to be appointed in a prescribed manner.

It was argued that the appropriation by the Commissioners of the appellant's land and water rights was not within their powers, because the dam complained of was constructed and used, not for the purpose of storing water to be supplied for the use of the inhabitants, but for generating power to raise the water to the required height. Their Lordships agree with the opinion expressed by the majority of the judges in the Supreme Court that, assuming this to be so, the water is nevertheless required for the purpose of the waterworks within the meaning of the Act, and

the Commissioners would be acting within their powers in appropriating the appellant's land and water rights, provided they had taken the necessary steps for that purpose. The question is whether they have done so.

Their Lordships are of opinion that, before the Commissioners can expropriate a landowner, they must first set out and ascertain what parts of his land they require, and must endeavour to contract with the owner for the purchase thereof. In other words, they must give to the landowner notice to treat for some definite subject-matter. And a similar procedure seems to be necessary where the Commissioners desire to appropriate a person's water rights, or to acquire some easement over his property. The arbitration clauses only come into operation on disagreement as to the amount of purchase-money, value, or damages, which, in itself, implies some previous treaty or tender involving notice of what is required. Their Lordships therefore are of opinion that the Commissioners have not put themselves into a position to compel the appellant to go to arbitration. Provisions for that purpose, such as are found in the present Act, are only applicable to acts done under the sanction of the Legislature, and in the mode prescribed by the Legislature. In this instance the Commissioners have not proceeded in accordance with the directions of their Act; and consequently the appellant has not lost his ordinary right of action for the trespass on his property. In coming to this conclusion their Lordships follow the principles laid down by this Board in *The Corporation of Parkdale* v. *West* (1) and *North Shore Ry. Co.* v. *Pion* (2), though the provisions of the Acts in question in those cases were somewhat different.

It was contended by Mr. Aylesworth that, at any rate, the Court, in the exercise of its discretion, should have given the appellant a judgment for damages only, and not for an injunction. The acts complained of in the present case are an illegal taking of the appellant's land, and an interference with the free use by him of his property, and the damages have been found to be of a substantial character. It has been frequently pointed out that to refuse an injunction in such a case would be to enable

(1) 12 App. Cas. 602. (2) 14 App. Cas. 612.

J. C.
1905
SAUNBY
v.
LONDON
(ONT.)
WATER COM-
MISSIONERS.

the defendant to expropriate the plaintiff without statutory authority, or without following the procedure pointed out by the statutory authority (if any). See *The Imperial Gas Light and Coke Co.* v. *Broadbent* (1) and *Shelfer* v. *City of London Electric Lighting Co.* (2). If and when the respondents think fit to proceed under the Act to expropriate the appellant the injunction will come to an end, but it is not necessary to qualify it by any words for that purpose.

Their Lordships will therefore humbly advise His Majesty that the judgment of the Supreme Court, dated April 27, 1904, be discharged, and the judgment of the Court of Appeal for Ontario, dated September 14, 1903, confirming the judgment of the Chief Justice of the King's Bench Division of the High Court of Justice for Ontario, be restored, with the variation that the damages be confined to the period beginning six months prior to the commencement of the action, and that the respondents should pay the costs of the appeal to the Supreme Court. The respondents will also pay the costs of this appeal.

Solicitors for the appellant: *Freshfields.*
Solicitors for the respondents: *Blake & Redden.*

(1) (1859) 7 H. L. C. 600.

(2) [1895] 1 Ch. 287.

[PRIVY COUNCIL.]

TORONTO RAILWAY COMPANY . . . . DEFENDANTS; J. C.*

AND 1905

CORPORATION OF THE CITY OF TORONTO PLAINTIFFS. *July* 28, 31; *Nov.* 8.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Ontario Judicature Act (Revised Statutes of Ontario, 1897, c. 51), *s.* 113—*Construction—Interest on Payments in Arrear.*

Ontario Judicature Act (Revised Statutes of Ontario, 1897, c. 51), s. 113, enacts that "interest shall be payable in all cases in which it is now payable by law or in which it has been usual for a jury to allow it":—

Held, that under the true construction of this section it is incumbent upon the Court to allow interest for such time and at such rate as it may think right in all cases where a just payment has been improperly withheld, and compensation therefor seems fair and equitable.

An order by the Court below that the appellant company should pay arrears of track rentals within the limits of the respondent city, over and above their periodical payments already made, and should pay interest thereon, was affirmed.

APPEAL from a decree of the above-mentioned Court (January 23, 1905), affirming a decree of a Divisional Court (February 9, 1904).

The main question decided was whether the respondents were entitled to recover interest from the appellants upon arrears of track rentals due by them, payment of which had, in the opinion of the Court, been improperly withheld.

Neither the trial judgment nor the judgments in appeal therefrom had declared the appellants liable for interest, nor had it been claimed in the statement of claim. The Master in Ordinary had on the reference made to him allowed interest at the rate of 6 per cent. per annum on the amount found due as damages for non-payment of a sum certain, and also which a jury would have been warranted in awarding. The Divisional Court affirmed this finding. In the appellate Court the Chief Justice considered that both sides could equally have ascertained by measurement the exact amount due under the contract, but that the

* *Present:* LORD MACNAGHTEN, LORD DAVEY, and SIR ARTHUR WILSON.

J. C. 1905 TORONTO RAILWAY v. TORONTO CORPORATION.

appellants merely objected to the respondents' measurements, made no attempt to ascertain the amount themselves, and procured delay by promises to settle. As no rule required the full legal rate to be paid, the appellate Court reduced it to 4 per cent.

Laidlaw, K.C., and *Blackstock, K.C.*, for the appellants, contended that the evidence shewed that as soon as the proper method of ascertaining the exact measurement had been arrived at, the parties promptly agreed and the amount was paid at once. There had been no delay. Interest had not been claimed in the suit or directed by any of the judgments prior to the master's investigation. There was no date or sum certain, the amount due was not capable of ascertainment from the document by a mere arithmetical calculation, and there was no evidence of demand. Under ss. 113 and 114 of the Judicature Act the only ground left was the contention that a jury would have allowed it. That clause in practice has been confined to tradesmen's accounts rendered in the ordinary course. There was no contract to pay interest. Reference was made to *London, Chatham and Dover Ry. Co.* v. *South Eastern Ry. Co.* (1); *Sinclair* v. *Preston.* (2)

Shepley, K.C., and *Rowlatt*, for the respondents, contended that this was a case in which interest was payable by law, and in which it has been usual for a jury under proper directions to allow it. It was claimed at the trial and was within the competence of the referee. Reference was made to *Toronto Street Ry. Co.* v. *City of Toronto* (3); *McCullough* v. *Newlove* (4); *McCullough* v. *Clemow.* (5) This was the case of a debt certain payable by virtue of a written statement at a certain time, for "if all the elements of certainty appear by the contract and nothing more is required than an arithmetical computation to ascertain the exact sum or the exact time for payment, that will be sufficient": see *London, Chatham and Dover Ry. Co.* v. *South Eastern Ry. Co.* (6); *Duncombe* v. *Brighton Club Co.* (7).

Laidlaw, K.C., replied.

(1) [1892] 1 Ch. 120, and [1893] A. C. 429.
(2) (1901) 31 Can. Sup. Ct. 408.
(3) [1893] A. C. 511, 515.
(4) (1896) 27 O. L. R. 627.
(5) (1895) 26 O. L. R. 467, 473.
(6) [1892] 1 Ch. 120.
(7) (1875) L. R. 10 Q. B. 371.

The judgment of their Lordships was delivered by

LORD MACNAGHTEN. This is an appeal from the Court of Appeal for Ontario. The result of the appeal to that Court was that the appellants, the Toronto Railway Company, were found liable to the Corporation of the City of Toronto for the payment of a mileage rate in respect of 940 feet of street railway track in Queen Street or Lake Shore Road west of Roncesvalles Avenue. They were, besides, ordered to pay interest on the moneys recovered in the action, but at a lower rate than that fixed by the Court from which the appeal was brought. These two points are the only matters involved in the present appeal. All other questions between the parties have been settled in the course of the action.

The action was brought in 1897 on a contract dated September 1, 1891, under which the railway company acquired from the Corporation the exclusive right of working street railways within the city, which at that time extended no further west than Roncesvalles Avenue. This privilege or franchise was granted for a term of years in consideration of the payment of certain mileage rates. Disputes, however, soon arose about measurements. In February, 1897, the corporation brought this action against the railway company, claiming a large sum over and above the periodical payments which had been made from time to time. At the original hearing in 1898 it was, among other things, declared that the company were not liable to pay a mileage rate in respect of the 940 feet of track in dispute. On appeal this part of the order was discharged, and it was referred to the Master in Ordinary to inquire and report by whom the track was constructed, and at what time and what rights of running upon it the railway company possessed. The master, after reviewing the evidence taken before him, found that this portion of the track was constructed by the railway company on or about June 30, 1893, as part of their own undertaking, and that their rights of running upon it were governed by the agreement of September 1, 1891, and were subject to the same obligations as were imposed upon the company with reference to their other tracks. The master's finding was upheld in the Divisional Court and also in the Court of Appeal. In their Lordships' opinion

J. C. 1905 TORONTO RAILWAY v. TORONTO CORPORATION.

the conclusion thus arrived at is plainly right. At the date when this piece of the track was laid the portion of Queen Street or Lake Shore Road on which it was constructed was within the limits of the city, and no person or body other than the corporation of the city had any jurisdiction or control over it or any right of interfering with its surface. As the Chief Justice observes: "The only lawful way in which the line could then be laid was under authority from the plaintiffs." The position of the corporation was undisputed, and their consent was taken for granted and treated as a matter of course. It was not until four years later, after the commencement of the action, that the railway company professed to have derived their authority from another source. The evidence offered in support of that suggestion is unsatisfactory and altogether inconclusive.

The question as to interest is not so simple. If the law in Ontario as to the recovery of interest were the same as it is in England, the result of modern authorities ending in the case of *London, Chatham and Dover Ry. Co.* v. *South Eastern Ry. Co.* (1) would probably be a bar to the relief claimed by the corporation. But in one important particular the Ontario Judicature Act (Revised Statutes of Ontario, 1897, c. 51), which now regulates the law as regards interest, differs from Lord Tenterden's Act. Sect. 113, which is a reproduction of a proviso contained in the Act of Upper Canada 7 Will. 4, c. 3, s. 20, enacts that "interest shall be payable in all cases in which it is now payable by law or in which it has been usual for a jury to allow it." The second branch of that section (as Street J. observes) is so loosely expressed as to leave a great latitude for its application. There is nothing in the statute defining or even indicating the class of cases intended. But the Court is not left without guidance from competent authority. In *Smart* v. *Niagara and Detroit Rivers Ry. Co.* (2) Draper C.J. refers to it as a settled practice "to allow interest on all accounts after the proper time of payment has gone by." In *Michie* v. *Reynolds* (3) the same learned Chief Justice observed that it had been the practice for a very long time to leave it to the discretion of the jury to give interest when

(1) [1893] A. C. 429.
(2) (1862) 12 C. P. 404.
(3) (1865) 24 U. C. R. 303.

the payment of a just debt had been withheld. These two cases are cited by Osler J.A. in *McCullough* v. *Clemow* (1), which seems to be the earliest reported case in which the question is discussed. To the same effect is the opinion of Armour C.J. in *McCullough* v. *Newlove*. (2) The result, therefore, seems to be that in all cases where, in the opinion of the Court, the payment of a just debt has been improperly withheld, and it seems to be fair and equitable that the party in default should make compensation by payment of interest, it is incumbent upon the Court to allow interest for such time and at such rate as the Court may think right. Acting on this view the Divisional Court and the Court of Appeal, consisting in all of seven learned judges, have given interest in the present case, though not without some hesitation on the part of Britton J. in the Divisional Court, and some hesitation on the part of Osler J.A. in the Court of Appeal.

Their Lordships have come to the conclusion that the judgment under appeal ought not to be disturbed. The question is one in which the opinion of those familiar with the administration of justice in the province is entitled to the greatest weight. Their Lordships are not satisfied that the decision of the Court of Appeal, which evidently has been most carefully considered, is in any respect erroneous.

Their Lordships will therefore humbly advise His Majesty that the appeal should be dismissed.

The appellants will bear the cost of the appeal.

Solicitors for appellants: *Harrison & Powell.*
Solicitors for respondents: *Freshfields.*

(1) 26 O. L. R. 467. (2) 27 O. L. R. 627.

[PRIVY COUNCIL.]

J. C.* 1905 *Aug.* 2, 3; *Dec.* 1.

CLOUSTON & CO., LIMITED . . . . . DEFENDANTS;

AND

CORRY . . . . . PLAINTIFF.

ON APPEAL FROM THE COURT OF APPEAL FOR NEW ZEALAND.

Action for Wrongful Dismissal—Plea of Justification—Verdict for Damages—Duty of the Trial Judge—New Trial ordered.

There is no fixed rule of law defining the degree of misconduct which will justify dismissal from service.

It is a question for the jury whether the degree of misconduct was inconsistent with the fulfilment of the express or implied conditions of service, so as to justify dismissal.

The judge should not submit any issue to them if, in his opinion, no evidence of justification has been given. If he submits the issue he should direct, guide and assist them; direct, by informing them of the nature of the acts which, as a matter of law, would justify dismissal; guide, by calling their attention to the material facts; assist, in a manner and to an extent which there is no reason to define.

In an action for wrongful dismissal where a plea of justification was substantially set up:—

Held, that the judge was right in submitting the issues of fact to the jury; that the verdict for the plaintiff was so unsatisfactory that it ought not to be maintained; that r. 5 in the Schedule to the Court of Appeal (New Zealand) Act, 1882 (similar to Order LVIII. r. 4, 1875), enabled judgment to be entered according to the evident justice of the case; but that under the circumstances a new trial should be directed.

APPEAL from a decree of the above Court (June 28, 1904), directing (Stout C.J. dissenting) judgment to be entered against the appellants for 875*l.*, and dismissing the appellants' motion to enter verdict and judgment for them, or in the alternative for a nonsuit, or in the alternative for a new trial.

The action was brought for wrongful dismissal in breach of a written agreement. The defence was a justification of the dismissal upon the ground—(*a*) of the purchase of produce by

* *Present:* LORD MACNAGHTEN, LORD DAVEY, LORD JAMES OF HEREFORD, LORD ROBERTSON, and SIR ARTHUR WILSON.

the plaintiff in contravention of his instructions; (*b*) of conduct of the plaintiff such as seriously to prejudice the business of the defendants; and the substantial question on the appeal was whether the determination of the justifiableness of the dismissal was for the jury or for the trial judge. The majority of the Court held that it was a question for the jury, and that the verdict must stand. The Chief Justice, who had been the trial judge, dissented, holding that the facts not being in dispute the question was one for the Court, and that the judgment ought to have been entered for the appellants. But he also held that, if it were a question for a jury, then a new trial should be ordered, as in his opinion the verdict was one which reasonable men could not have found.

Lush, K.C., and *Northcote*, for the appellants, contended that on the evidence the dismissal was justified. They cited *Amor* v. *Fearon* (1); *Lilley* v. *Elwin* (2); *East Anglian Rys. Co.* v. *Lythgoe*. (3) The question turned upon the legal effect of the evidence, and it was not for the jury to decide as to the legal rights of the parties: *Horton* v. *McMurtry* (4); *Morgan* v. *Savin* (5); *Doherty* v. *The Education Board of Wellington* (6); *Pearce* v. *Foster* (7); *Boston Deep Sea Fishing Co.* v. *Ansell* (8); *Fillieul* v. *Armstrong*. (9) The Court of Appeal had jurisdiction to enter judgment for the appellants in this case, and ought to have done so: *Allcock* v. *Hall* (10); *Millar* v. *Toulmin* (11); *New Zealand Commissioners* v. *Nash*. (12)

Tyrrell Paine (*Cohen, K.C.*, with him), for the respondent, contended that the question whether he had been wrongfully dismissed was in the circumstances one for the jury, and not for the judges. There was evidence on the record which justified

(1) (1839) 9 A. & E. 548.
(2) (1848) 17 L. J. (Q.B.) 132.
(3) (1851) 20 L. J. (C.P.) 84.
(4) (1860) 29 L. J. (Ex.) 260; S. C. 5 H. & N. 667.
(5) (1867) 16 L. T. (N.S.) 333, 457.
(6) (1878) 4 N. Z. Jur. (N.S.) 78.
(7) (1886) 17 Q. B. D. 536.
(8) (1888) 39 Ch. D. 339.
(9) (1837) 7 A. & E. 557.
(10) [1891] 1 Q. B. 444.
(11) (1886) 17 Q. B. D. 603; but see the same case in (1887) 12 App. Cas. 746.
(12) (1894) 3 N. Z. L. R. 139, 143.

J. C. 1905 CLOUSTON & CO., LIMITED v. CORRY.

them in coming to the conclusion that the respondent's conduct was fairly explicable, and that his dismissal was wrongful. It was entirely a question of fact whether there was that degree of misconduct which entitled the appellants to put an end to the contract, and it was within the province of the jury to decide it; and the Court of Appeal was right in holding that, whether or not they agreed with it, the verdict was one which reasonable men could find. Accordingly the appellants were bound by it; for it could not be disturbed unless it was held that no jury could have found it as reasonable men: see *Metropolitan Ry. Co.* v. *Wright* (1); *Australian Newspaper Co.* v. *Bennett.* (2) He cited many of the cases which had been referred to on the other side, and also *Lomax* v. *Arding* (3); *Atkin* v. *Acton.* (4) The former case sanctions a distinction between the cases of a menial servant and of a man who, like the respondent, had a business and business connections of his own, which he is transferring to his employers, thereby placing his relations to them on a footing distinct from ordinary service. And where the conduct relied on is not necessarily incompatible with continued service as being prejudicial to the employers' business, it is a question of fact for a jury whether the justification is made out. Under all the circumstances the jury could reasonably find that the employers were not injured in their business by the respondent's conduct.

Lush, K.C., replied.

1905 *Dec.* 1.

The judgment of their Lordships was delivered by

LORD JAMES OF HEREFORD. This is an appeal from a judgment of the Court of Appeal of New Zealand, directing judgment to be entered for the plaintiff (the present respondent) for 875*l.* and costs.

The material facts of the case appear to be as follows:—

Prior to September, 1902, the plaintiff had carried on business in New Zealand as an agent for the purchase of barley, and as a dealer in farm produce. He also conducted an insurance office

(1) (1885) 11 App. Cas. 152.
(2) [1894] A. C. 284.
(3) (1855) 10 Ex. 734.
(4) (1830) 4 Car. & P. 208.

business. The appellant company carried on a similar business in the same district.

On September 18, 1902, an agreement was entered into between the plaintiff and the defendant company, whereby the plaintiff undertook faithfully to serve the defendant company for five years as manager of the grain and produce department of the business of the company. He also undertook to obey all commands and instructions given to him, and to use his best endeavours to bring to the defendants the business agencies and clients of the firm to which he had belonged. In return the defendants undertook to pay the plaintiff 500*l.* per annum and a percentage on the profits made on business introduced by him.

The plaintiff entered upon his duties under this agreement, and continued in the defendants' service until November 17, 1903, when he was dismissed. It is for this dismissal, alleged to be wrongful, the action was brought.

The statement of claim set out the above facts, and contained a claim for 3000*l.* damages.

The statement of defence justified the dismissal of the plaintiff on the grounds: First, that the plaintiff had disobeyed the orders of the directors of the defendant company. Secondly, that the plaintiff had on November 9, 1903, been arrested in the streets of a township called Havelock, on a charge of drunkenness and disorderly conduct, and fined for such offences.

The trial took place in March, 1904, before the Chief Justice of the Supreme Court of New Zealand and a jury. In support of the allegations in the statement of defence that the defendants were justified in dismissing the plaintiff, evidence was given to shew that the plaintiff had, as agent for the defendants, made purchases of goods contrary to the orders given him by the directors of the defendant company; and secondly, that the plaintiff had in the month of November, 1903, grossly misconducted himself at a place called Havelock and had been convicted by a magistrate of drunkenness.

The first ground of justification was during the argument before their Lordships very properly abandoned by the counsel for the appellants (the defendants), inasmuch as the second

J. C. 1905

CLOUSTON & Co., LIMITED v. CORRY.

ground of defence presented facts of a much more serious character than the first. The evidence given by the defendants as to the plaintiff's drunkenness and the use of foul language at Havelock was very strong and virtually admitted by the plaintiff. His own account is as follows:—

"I went to Havelock on the 8th November. . . . . I stopped on the night of the 8th at Duggan's Hotel. I arrived there at 7.30 P.M. I think I was sober when I arrived, but I am not sure of anything that happened there. I might have got drunk on the night of the 8th. I do not remember, but I misconducted myself on the 9th. I remember Mr. Taylor coming to me on the morning of the 9th. I was not drunk then. He came to me on business. I told him to go to hell because he had accused me of not replying, acknowledging the receipt of money he had sent to me. . . . . The receipt of the money had been acknowledged. . . . ."

Question: "Did you use foul and coarse language in a public street when there were ladies in the balcony of the hotel close by?" Answer: "I would not say that I did not. I think I did go to the sergeant of police to ask him to compel the publican to give me more drink. I do not know that I wanted to fight. I do not remember two gentlemen asking me to desist because there were ladies on the balcony. I got out of the lock-up at 11 P.M. on the 9th and started drinking again. I think I was mad when I was in the police court on the 10th. There was a report of the affair in the *Pelorus Guardian* of what took place in the police court. I cannot say whether or not it is inaccurate. Some of my friends tried to get the paper not to publish it. (Report put in.) I do not say anything in extenuation of my conduct, and it was not fit conduct for any person who held my office. I cannot say how many times a man can so act."

He also said, "I have commonly been drunk"; and it was further alleged that the habitual drunkenness was known to certain officers of the defendant company.

In respect of this misconduct, the plaintiff was charged before and convicted by a magistrate at Havelock, and a report of the proceedings appeared in the Press.

At the conclusion of the evidence the counsel for the defendants submitted:—

(1.) That unless the jury disbelieved the evidence as to the conduct at Havelock they must find a verdict for the defendants.

(2.) That certain purchases admittedly made by the plaintiff were made in direct violation of the orders given to him by the board of directors of the defendant company, and that on that ground also the verdict should be entered for the defendants.

The learned Chief Justice declined to accede to this submission, but leave was reserved to the Full Court to enter a nonsuit, or to enter a verdict for the defendant company.

The following questions were left to the jury:—

"(1.) Did the plaintiff disobey the order and direction of the defendant company in the purchase of chaff from Woodward?

"(2.) If so, was the defendant company justified in dismissing the plaintiff?

"(3.) Was the defendant company justified in dismissing the plaintiff for his conduct at Havelock on November 9 and 10, 1903?

"(4.) What damages, if any, is the plaintiff entitled to recover?"

To the first of the above questions the jury answered, Yes. To the second and third, No. To the fourth, 875*l.*

After the verdict had been given the learned Chief Justice expressed considerable doubt as to the course he ought to pursue, but in the result allowed the verdict to be entered for the plaintiff for 875*l.*, reserving "full power for the Court to enter a verdict for the defendant if it should turn out that the matter is wholly one of law." The Chief Justice added, "The facts in this case are not in dispute, and if it is the function of a judge to determine that the dismissal was justifiable, then the Court is to have power to do so, and to enter a verdict for the defendant, and also to grant a nonsuit if it should be the opinion of the Court that the plaintiff's conduct justified the defendant in dismissing him."

The defendants duly gave notice of motion, pursuant to leave reserved, to enter judgment for them—

(1.) Upon the ground that upon the facts admitted by the

J. C. 1905 — — CLOUSTON & Co., LIMITED v. CORRY. — —

plaintiffs the learned judge ought either to have entered judgment for the defendant company or to have directed the jury to find for them, or to have directed a nonsuit.

(2.) Upon the ground that the learned judge refused to direct the jury as requested by the defendants' counsel that if they believed the defendants' evidence (which was uncontradicted) they must find a verdict for the defendant company.

(3.) That the learned judge misdirected the jury in directing them that the facts being admitted, the question whether such facts justified the dismissal of the plaintiff was a question for the jury.

(4.) In the alternative, that there should be a new trial on the ground that the verdict was against the weight of evidence.

By consent it was ordered that the motion founded on these notices should be removed into the Court of Appeal for hearing.

The case was argued in the Court of Appeal of New Zealand before the Chief Justice and Williams, Edwards, Denniston, Chapman and Cooper JJ. The case was very fully considered, and elaborate and learned judgments were given by the members of the Court. The Chief Justice was of opinion that his direction at the trial was wrong, and that the verdict should have been entered for the defendants. The other members of the Court were of opinion that the case was rightly submitted by the Chief Justice to the jury, and that the verdict they arrived at was correct, and ought not to be disturbed. From that judgment the defendant company obtained leave to appeal to His Majesty in Council.

Both in the arguments of counsel and in the elaborate judgments delivered by the judges of the Court of Appeal very many cases were referred to. Reliance cannot be placed upon all of them, for very much must depend upon the exact words used in the judgments given, and summaries composed by the reporters of trials at Nisi Prius may not always convey the exact ruling of the presiding judge. It is difficult also to determine whether the words quoted in the reports represent words of advice or of absolute direction. Still there are cases which can be quoted in support of either side of the question involved, and between some of them it is apparently impossible to avoid a conflict. It seems

unnecessary to pass all these cases again in review, but their Lordships have fully considered them, and are aided by them in arriving at the conclusion they now express.

In an action brought to recover damages for alleged wrongful dismissal from service, a defence, which in former days would have been embodied in a plea of justification, is set up. Allegations of misconduct, drunkenness, the use of foul language in public, resulting in conviction, are made, supported by strong evidence virtually admitted by the plaintiff to be true. And upon such facts the question arises what is the power and the duty of the presiding judge. Ought he to withdraw the case from the jury and with his own hand enter a verdict for the defendant, or ought he to leave the case to the jury, asking them if they think the facts proved justified the dismissal of the plaintiff?

In the present case the tribunal to try all issues of fact was a jury. Now the sufficiency of the justification depended upon the extent of misconduct. There is no fixed rule of law defining the degree of misconduct which will justify dismissal. Of course there may be misconduct in a servant which will not justify the determination of the contract of service by one of the parties to it against the will of the other. On the other hand, misconduct inconsistent with the fulfilment of the express or implied conditions of service will justify dismissal. Certainly when the alleged misconduct consists of drunkenness there must be considerable difficulty in determining the extent or conditions of intoxication which will establish a justification for dismissal. The intoxication may be habitual and gross, and directly interfere with the business of the employer or with the ability of the servant to render due service. But it may be an isolated act committed under circumstances of festivity and in no way connected with or affecting the employer's business. In such a case the question whether the misconduct proved establishes the right to dismiss the servant must depend upon facts—and is a question of fact. If this be so, the questions raised in the present case had to be tried by the jury.

But in cases where the trial must so take place the presiding judge has important duties to fulfil. It is for him to say whether

J. C. 1905 — CLOUSTON & Co., LIMITED v. CORRY.

there is any evidence to submit to the jury in support of the allegation of justifiable dismissal. If no such evidence has in his opinion been given, he should not submit any issue in respect of such allegations. The judge may also direct, guide, and assist the jury. He may direct by informing them of the nature of the acts which as a matter of law will justify dismissal. He may guide them by calling their attention to the facts material to the determination of the issues raised, and he may assist them in a manner and to an extent there is no reason to define. There have been judges—more numerous in the past than in the present—who possessed and exercised the power of addressing a jury in terms of apparent impartiality, and yet of placing before them views which seldom failed to secure the verdict desired by the judge to be recorded. Some trace of the exercise of this influence may be found in the following terms in which Sir Frederick Pollock guided the jury in the case of *Horton* v. *McMurtry* (1): "Gentlemen, I believe it is for you to decide whether this was a proper ground of dismissal—but if it be a matter of law . . . . my opinion is that it is a good ground of dismissal." The jury found for the defendant.

For these reasons their Lordships are of opinion that the learned Chief Justice was correct in submitting the issues of fact to the jury, and that in this respect the judgment given by the majority of the Court of Appeal is also correct. But a further question has to be determined. During the course of the argument before their Lordships no information could be obtained as to the existence of any rules of procedure in New Zealand corresponding to those existing in this country enabling judgment to be entered according to the evident justice of the case. (2)

But since the conclusion of the arguments their Lordships have been referred to rule 5 in the Schedule to the Court of Appeal (New Zealand) Act, 1882, which apparently confers powers substantially identical with those existing in this country.

But as far as their Lordships can gather from the judgments delivered in the Court of Appeal of New Zealand the point that judgment should be entered for the defendants by that Court

(1) 5 H. & N. 667; 29 L. J. (Ex.) 260.
(2) Order LVIII., r. 4, 1875.

was not submitted to it, and it certainly was not referred to in the judgments of the learned judges. And the learned Chief Justice, whilst expressing a strong opinion that the verdict was unsatisfactory, contented himself with saying: "I may further add that if I had come to the conclusion that it was a case for the jury only, then I should have been of opinion that their verdict was against the weight of evidence and that a new trial should be ordered; for I do not think that the verdict was one twelve reasonable men should have found."

Under these circumstances, whilst their Lordships are of opinion that the verdict found for the plaintiff is so unsatisfactory that it ought not to be maintained, yet they refrain from exercising powers apparently not sought to be enforced by the appellants in the Court below, or from exceeding the views expressed by the learned Chief Justice, and so they have come to the like conclusion, that the proper course to pursue is to direct that a new trial shall take place.

Their Lordships will therefore humbly advise His Majesty that the judgment of the Court of Appeal should be discharged and this appeal allowed to the extent of ordering that a new trial shall take place, and that the costs of all the proceedings in the Courts below shall depend upon the result of the new trial. The respondent will pay to the appellants their costs of this appeal.

Solicitors for appellants: *Blyth, Dutton, Hartley & Blyth.*
Solicitors for respondent: *Paines, Blyth & Huxtable.*

[PRIVY COUNCIL.]

J. C.* 1905 *Nov.* 28.

WALTER BAINE GRIEVE . . . . . DEFENDANT;

AND

MARION JACK TASKER . . . . . PLAINTIFF.

ON APPEAL FROM THE SUPREME COURT OF NEWFOUNDLAND.

Practice—Appeal admitted by the Supreme Court dismissed as Incompetent—Special Leave to Appeal refused.

Where a final decree for money was made against the appellant on April 6, 1898, and a motion to set it aside was dismissed on June 7, 1899, and again on August 29, 1904, and the appellant's application to restrain execution was refused on March 20, 1905:—

Held, on the respondent's petition, that an appeal from the order of March 20, 1905, must be dismissed. It was merely a repetition of the order of August 29, 1904, from which an appeal was barred.

Held also, on the appellant's petition that special leave to appeal from the orders of June, 1899, and August, 1904, must be refused, having regard to delay, and the impossibility of obtaining any relief without reversing the final judgment of April 6, 1898, to which no objection could be maintained.

THE first petition was by the respondent to dismiss the appeal, without hearing the same on its merits, on the ground that it was, under the circumstances stated in their Lordships' judgment, incompetent, being in substance an appeal against the judgment referred to therein of October 13, 1897. It alleged that the appeal was based upon matters which might have been brought before the Court prior to that judgment, and prior to the decree founded thereon of April 6, 1898, but which were not brought forward till June 5, 1899, when a motion was made to set it aside which was refused two days later. It further alleged that a similar application, made as late as August 8, 1904, had been refused in the same month, and that the judgment appealed from (March 20, 1905) merely repeated the refusals made on June 7, 1899, and August 29, 1904, of substantially the same application as had been

* *Present*: LORD DAVEY, SIR FORD NORTH, SIR ANDREW SCOBLE, and SIR ARTHUR WILSON.

made on the said June 5, 1899; the terms of it being to set aside the judgment or to restrain any execution thereof except for the purpose of proof in the bankruptcy of the appellant in certain sequestration proceedings in Scotland, in which it was alleged that both the appellant and his firm had been discharged.

J. C. 1905 GRIEVE v. TASKER.

The second petition was by the appellant for special leave to appeal from the orders of June 7, 1899, and August 20, 1904, on the ground that it would be as necessary for him to bring them into discussion "in their bearing upon the said latest decision as the said latest decision itself."

Sir R. Reid, K.C., and *J. W. Gordon*, for the first petitioner.
Asquith, K.C., and *Kerly*, for the second petitioner.

1905 *Nov.* 28.

The judgment of their Lordships was delivered by

LORD DAVEY. Their Lordships are of opinion that the appeal which has been presented to His Majesty in Council is incompetent, and that the first petition (the petition of the respondent) ought to be granted, and their Lordships will state shortly their reasons for coming to this conclusion.

It is not necessary to go through the whole of this long and complicated story. The starting point is an action commenced by the respondent against the appellant on December 23, 1896, in the Supreme Court of Newfoundland. In this action judgment was given on October 13, 1897, declaring the liability of the appellant, and on April 6, 1898, the Supreme Court made a final decree for payment by the appellant of $22,295. The objection which is taken against that decree is that, at the time when it was made, the appellant (the defendant) had obtained his discharge in certain bankruptcy proceedings in Scotland.

Their Lordships are not satisfied that the appellant did not know the fact of his having obtained his discharge before the judgment of October 13, 1897. If it were necessary to express an opinion upon that point, their opinion would be that there is evidence that he did know of the discharge, because he must have received, and it is not denied that he could have received, the letter of September 27, 1897, which has been mentioned. The inference from the date of that letter is that it was a letter

J. C
1905
GRIEVE
v.
TASKER.

conveying the intelligence that the discharge had been granted. That, however, is immaterial, because the final decree in the suit was not made till April 6, 1998, and it is not disputed that long before that date the appellant knew that the discharge had been granted in Scotland, and, in fact, had obtained copies of the discharge. If he intended to raise this point in the action, what was his proper course? His proper course at that time was to have moved the Court to discharge the previous order of October 13, 1897—which, after all, was not a final judgment, but an interlocutory order—and to give him liberty to amend his pleadings by pleading this discharge. He did not do so, but he applied for and obtained leave to appeal to Her late Majesty in Council, though in that appeal he could not, apparently, have raised the point in question. This appeal he subsequently abandoned. In June, 1899, he made a motion for an order setting aside the above judgment, or limiting its effect to its being made the subject of proof in the bankruptcy proceedings. This motion was dismissed by an order dated June 7, 1899. He did nothing more till 1904. He then applied for an order which was substantially the same as he had applied for in June, 1899. This application was refused on August 29, 1904. Again, he did not appeal to His Majesty in Council from the order of August 29, 1904. It appears that on December 1, 1904, leave was given to the respondent to issue execution. On March 20, 1905, an application by the appellant for what was, in fact, exactly the same thing as he had already applied for in August, 1904, namely, to restrain execution, was refused. He then obtained leave to bring the appeal which is now before their Lordships, viz., from the order of March 20, 1905.

It is manifest, if those dates are looked at, that, in the first place, the appellant cannot move a step without first getting rid of the previous judgments of 1897 and 1898, and that, therefore, the appeal, while those judgments stand, would be a perfectly idle appeal; and, in the second place, that the order from which he has obtained leave to appeal in the Colony, is only a repetition of an order made in the previous year from which he could not appeal. It need scarcely be stated that this Board would never allow an appellant, who is out of time for appealing from

an order, to make a fresh application to the Court for the same thing over again, and to get it refused in order to enable him to bring himself within time. It would be trifling with the practice of the Board to allow him to do so. The appellant seems to be perfectly aware of his difficulty, because in his present petition he asks for leave to appeal against the orders of June 7, 1899, and August 29, 1904. He is perfectly aware of the objection which has been stated to the competency of his appeal. Their Lordships are not prepared to say that the appellant ought to have leave to extend his appeal in that manner. He is asking for an indulgence from the Board. Is he in a position to ask for that indulgence? Having regard to the delay he has allowed to take place in the assertion of what he thinks are his rights, and to his neglect, when all the facts were known to him and his advisers, to bring the matter properly before the Court, and having regard, further, to the impossibility of his getting any relief, such as was refused to him by the orders of June 7, 1899, and August 29, 1904, without setting aside the final judgment of April 6, 1898, their Lordships think it is not a case in which they should advise His Majesty to allow him to extend the appeal in the manner sought.

Their Lordships will, therefore, humbly advise His Majesty that the respondent's petition ought to be granted, and the appeal dismissed, and that the appellant's petition for leave to appeal ought to be dismissed. The appellant will pay the costs of the appeal and of both the petitions.

Solicitors for the respondent petitioner: *Taylor, Rowley, Lewis & Davis.*

Solicitors for the appellant petitioner: *Hollams, Son, Coward & Hawksley.*

[HOUSE OF LORDS.]

H. L. (E.) 1906 *March* 20.

WILLIAMS AND OTHERS . . . . . APPELLANTS.

AND

NORTH'S NAVIGATION COLLIERIES (1889) LIMITED . . . . . RESPONDENTS.

Employer and Workman—Truck Acts—Deduction from Wages—Set-off—Debt due from Workman to Employer—Truck Act, 1831 (1 & 2 *Will.* 4), *c.* 37, *s.* 3.

The Truck Act, 1831, does not allow an employer when paying wages to a workman to make any deductions except those expressly sanctioned by the Act. Therefore he cannot deduct money which a Court of summary jurisdiction has ordered the workman to pay to the employer in respect of breaches of contract to work.

The decision of the Court of Appeal, [1904] 2 K. B. 44, reversed.

THE appellants, who were workmen in the service of the defendant company, were entitled to wages payable on January 30, 1904. Having absented themselves from work shortly before, each of them had been ordered by magistrates in petty sessions under the Employers and Workmen Act, 1875, to pay to the defendant company 30*s.* by instalments, of which 10*s.* was due on January 30. In the case of the appellant Williams, which was typical of the rest, he had earned 3*l.* 13*s.* 2*d.* and received 3*l.* 2*s.*, the difference consisting of an agreed deduction of 1*s.* 2*d.* for doctor, and the 10*s.* which was not agreed. The appellants having brought an action against the company for damages, a declaration, and an injunction, an order for an interim injunction was made by Bucknill J. at chambers. In the Court of Appeal (Collins M.R., Romer and Mathew L.JJ.) it was agreed that the relief claimed should be limited to a declaration that the 10*s.* was improperly deducted. The Court of Appeal reversed the decision of Bucknill J., holding that the deduction was legal. Hence the present appeal.

March 1, 2. *S. T. Evans, K.C., and Bailhache* (*John Sankey* with them) for the appellants. The Truck Act, 1831, s. 3, uses plain unmistakeable language: it requires payment of the entire

amount of the wages in coin. In *Hewlett* v. *Allen* (1), Bowen L.J. enforces the strict literal interpretation of the words: "The statute insists (in all but the excepted cases) on actual payment in coin. Payment in account will not do. Payment in goods will not do. Nothing is to discharge the wages debt except actual payment in current coin." Later the Lord Justice says: "The employer cannot, for the purpose of compliance with the statute, be both payer and payee. To hold otherwise would be to make the statute idle." *Chawner* v. *Cummings* (2), which is relied upon by the respondents, is really in the appellants' favour. After observing "that *payment* otherwise than in money is alone prohibited," Lord Denman C.J., in respect of the deductions for frame rents which were there allowed, said: "Then, are these deductions in the nature of payment at all? It seems to us to be the mode of calculating the amount of wages, and nothing more." The same principle was applied in *Archer* v. *James* (3), where it was pointed out that such deductions contracted for by the workmen did not come out of wages. In those cases the contract of labour was carried out by the employer. Not so here. There must be a written contract even to justify deductions for medical attendance, and such deductions—there having been no contract—had to be repaid in *Pillar* v. *Llynvi Coal and Iron Co.* (4); and see *Ex parte Cooper*. (5) In *Lamb* v. *Great Northern Ry. Co.* (6) A. L. Smith J. said: "The Legislature seems undoubtedly to have started by making all drawbacks illegal," except those authorized by s. 23. In *Smith* v. *Walton* (7) it was held that deductions for damaged goods were payment otherwise than in current coin, and that a penalty was incurred under s. 9. *Willis* v. *Thorp* (8) was under the Hosiery Manufacture (Wages) Act, 1874, and fines were allowed to be deducted as not being prohibited under that Act. But the principle is well expressed by Benjamin, Q.C., in his argument for the employer: "The master can deduct nothing which does not depend upon the will of the workmen;

(1) [1892] 2 Q. B. 662, 666; affirmed [1894] A. C. 383.
(2) (1846) 8 Q. B. 311, 323.
(3) (1862) 2 B. & S. 61, 86; 31 L J. (Q.B.) 153, 162.
(4) (1869) L. R. 4 C. P. 752.
(5) (1884) 26 Ch. D. 693.
(6) [1891] 2 Q. B. 281, 285.
(7) (1877) 3 C. P. D. 109.
(8) (1875) L. R. 10 Q. B. 383.

H. L. (E.) 1906 WILLIAMS v. NORTH'S NAVIGATION COLLIERIES (1889) LIMITED.

he cannot, therefore, deduct for things like frame rent or standing; but a fine is a thing which a workman may or may not incur at his will." The stringency of the obligation to pay in coin is increased by the words "payable to" in s. 3.

Bankes, K.C., and *Lush, K.C.* (*A. J. Ashton* with them), for the respondents.

The Truck Act, 1831, was aimed at the mode, not the amount, of payment, and prohibits payment in equivalents. The words "earned by or payable to" contemplate the case where the wages earned are larger than the amount payable, and imply that deductions besides those specified may be allowed. Sect. 5 prohibits certain specified sets-off, and implies, therefore, that all others are allowed. There can be no distinction between sets-off in an action for wages and in the payment of wages. The Act simply declares that the amount payable must be paid in coin. The employer owes only what he can be made to pay by process of law: he does not owe the wages without deducting the set-off. It would be a rare anomaly if the employer can set off in an action but not in payment. The respondents are not seeking to pay an unauthorized sum, only refusing to pay the sum claimed. It is not the delay or omission to pay, but only the mode of payment, which is dealt with. The employer might refuse to pay, and under the Act there is no offence created for refusal to pay; the Act does not deal with non-payment. If the appellants brought an action to recover their wages it is clear that these instalments would be deducted by the Court. It is exactly the same as if the master had lent his servant a sovereign; he would be entitled to stop it out of wages. A. L. Smith J. in *Lamb* v. *Great Northern Ry. Co.* (1) was only referring to the kind of "drawbacks" referred to in the Act—payment by equivalents. In *Redgrave* v. *Kelly* (2) deduction of fines was held not to be an offence. This is an a fortiori case, as the fines there were imposed by the employer as a term of service, here by an order of Court: see also *Beetham* v. *Crewdson*. (3) In *Archer*

(1) [1891] 2 Q. B. 281, 285. (2) (1889) 37 W. R. 543; 54 J. P. 70.
(3) (1890) 55 J. P. 55.

v. *James* (1) the judgments are really in favour of the respondents. Bowen L.J.'s judgment in *Hewlett* v. *Allen* (2), taken as a whole, is not adverse to the respondents, and the speeches of Lord Herschell L.C. and Lord Watson are wholly irreconcilable with the appellants' contention. Lord Herschell expressly justifies sets-off, except those which are prohibited, and Lord Watson holds that advances of money by the employer are not recoverable by the workman. The Act is penal and must be construed strictly, and there is nothing express or implied to make unlawful the deduction of moneys due upon a cross judgment.

S. T. Evans, K.C., in reply.

The House took time for consideration.

March 20. LORD LOREBURN L.C. My Lords, I do not propose to enter upon a consideration of the authorities that were cited to us in the course of the argument or dealt with in the Court of Appeal, as I understand that my noble and learned friend Lord Davey intends to refer to them. But I have come to the conclusion that the judgment appealed from ought to be reversed and a declaration given in the sense asked for by the plaintiffs. The facts lie in the narrowest compass. [His Lordship stated the facts given above.]

The question is whether the employers, when they paid the wages on January 30, were in law bound to pay in coin the total due for wages, or were entitled in law to deduct 10*s*. due from the workmen to the employers, and pay merely the balance in coin. This turns upon the true construction of s. 3 of the Truck Act, 1831. Now I find in that section an explicit enactment that "the entire amount of the wages earned by or payable to a workman" shall be "actually paid" to him in the current coin of this realm, "and not otherwise."

The section does not say when it is to be paid, for the common law will settle that as soon as the agreement of service is ascertained. The section does say that when paid it shall be paid in

(1) 2 B. & S. 61, 86; 31 L. J. (Q.B.) 153, 162.

(2) [1892] 2 Q. B. 662, 666; affirmed [1894] A. C. 383.

H. L. (E.) 1906

WILLIAMS v. NORTH'S NAVIGATION COLLIERIES (1889) LIMITED.

Lord Loreburn L.C.

coin of the realm, and not otherwise. I cannot think this means that it shall be paid as to part in coin and as to the remainder in account.

Our attention was directed in argument to the word "payable"; we were invited to hold that the obligation to pay in coin applied only to the entire amount of wages payable after deducting cross-claims. In this case it was argued that only 3*l*. 2*s*. was payable, because, on striking an account, that was the balance due.

A reference to s. 23 shews, to my mind, that this would be a wrong interpretation even if the language of the Act admitted of it. Sect. 23 provides, with elaborate care, and under strict safeguards, the cases in which debts due from the workman may be deducted from the wages due to the workman when the employer is paying the wages. These provisions would be wholly unnecessary if an employer were already authorized by s. 3 to deduct anything that the workman owed him and to pay in coin merely his balance.

The word "payable" may have been inserted because otherwise the law could have been evaded by making wages payable in advance, before they had been earned. Or it may have been inserted because there might be deductions authorized by s. 23 which would not diminish the wages earned but would diminish the sum payable for wages. However that may be, it appears to me that an obligation rests upon the employer under the Truck Act, 1831, s. 3, to pay in coin (for we are not concerned with bank notes in this case) all the money payable as wages, and that in ascertaining how much is payable as wages he can subtract nothing except the deductions expressly sanctioned by the Act. The deduction of 10*s*. for fines was therefore in the present case illegal.

Mr. Lush argued that this construction would be very anomalous. He urged that if the employer did not pay the wages at all and were sued, he would be entitled then to set off in the action anything due to him except such sums as fall within the prohibition of s. 5. It would be strange, said Mr. Lush, if an employer could, by breaking his contract and forcing litigation, obtain an advantage denied to him if he fulfilled his contract. No doubt

this would be an anomaly, as are the Truck Acts themselves, and some other Acts which interfere in a limited degree with freedom of contract. It is necessary to distinguish between the clauses of the Act relating to set-off in an action and those relating to stoppage or deduction when the wages are paid. Possibly the Legislature thought a Court might be trusted to strike a balance in the rare cases where the dispute came into Court, but that the vast multitude of weekly or other payments which never come near a Court ought to be regulated by a simple and wholesome rule, namely, that they should be paid wholly in coin save for certain carefully specified exceptions. This is, however, a mere conjecture. It is enough to say that, assuming the Act of Parliament has so provided, the fact that the provision is anomalous does not permit us to disregard the plain meaning of the words used.

Accordingly I advise your Lordships to reverse the judgment of the Court of Appeal, and to enter judgment for the appellants with a declaration in the sense prayed.

LORD MACNAGHTEN. My Lords, I have had an opportunity of reading in print and considering the judgment which has just been delivered, and I entirely agree in it.

LORD DAVEY. My Lords, I agree with the judgment of my noble and learned friend on the woolsack, and with the reasons which he has given for his judgment.

The learned judges in the Court of Appeal rested their decision mainly on the ground that it was neither an offence nor a violation of the statute to give effect to a legal right of set-off. Set-off in an action I understand. It is a right given by statute to a man who is sued for a sum of money to defend himself by claiming a debt due to himself from the plaintiff in satisfaction or reduction of the debt for which he is sued. But set-off outside the Court means nothing more than a claim of deduction and retention, and the question comes to be whether the deduction of a cross debt which might be the subject of a set-off in an action is a legitimate deduction or whether the express enactment that the entire amount of the wages shall be actually paid in current coin can be so qualified. I agree with my noble and

H. L. (E.) 1906 — WILLIAMS v. NORTH'S NAVIGATION COLLIERIES (1889) LIMITED. — Lord Davey.

learned friend that there can be but one answer to that question. By s. 23 and s. 24 certain deductions are permitted to be made, or, to use the language of the marginal note, "particular exceptions to the generality of the law," are made under strictly defined conditions, and no other deductions or particular exceptions are in my opinion authorized.

The learned counsel for the respondent argued that the employer was not bound by the Act to pay in full, and non-payment was not an offence under the Act. Be it so—but this was not a case of non-payment or repudiation by the master of his debt, but of retention of a part of the workman's admitted wages in payment of a debt to himself, and was intended to be payment or satisfaction pro tanto of the workman's wages. Bowen L.J. stated the exact point in *Hewlett* v. *Allen* (1), when, commenting on the 3rd section, he said that payment in account will not do, and that the employer cannot for the purpose of compliance with the statute be both payer and payee, while, on the other hand, he held that set-off in an action was only prohibited in the cases mentioned in s. 5. It is sufficient to look at the account which was handed to one of the appellants, to see that this is nothing more than payment in account, which I agree with the Lord Justice will not do. I will only add that I can see very good reasons why the Legislature should not allow a deduction to be made by the employer himself, although it might be the subject of set-off in an action where the amount and propriety of it could be impartially investigated.

Mr. Lush boldly said that there was a clear and consistent current of authority in favour of the respondents, and it was too late for this House to revert to the views of the appellants. My Lords, the exact contrary of this statement appears to me to be nearer the truth. Not a single one of the numerous cases which were cited in my opinion supports the argument of the respondents, and a great deal is to be found in the judgments of the learned judges which is against them. In *Chawner* v. *Cummings* (2) the plaintiff was presumed to have contracted upon the usual and well-known terms in the trade, and certain

(1) [1892] 2 Q. B. 662, at p. 666 (2) 8 Q. B 311

customary deductions which had been made from his nominal wages were held not to be in the nature of payment at all, but the mode of calculating and ascertaining the actual amount of his wages. *Archer* v. *James* (1) was a similar case, and was decided in the first instance on the authority of *Chawner* v. *Cummings* (2). In the Exchequer Chamber three judges held that *Chawner* v. *Cummings* (2) was wrongly decided, and three other judges, on the other hand, approved the decision, and held that the deductions in question in the case before them were in the same category and were elements only in calculating the real amount of the workman's wages. But there is not a word in any of the judgments which supports the contention that when the amount of the wages is ascertained the employer can discharge himself by set-off or payment in account.

In *Pillar* v. *Llynvi Coal and Iron Co.* (3) it was only decided that deductions of the character authorized by s. 23 could not be made unless there was a contract in writing as required by the sections. In *Smith* v. *Walton* (4) the workman having damaged a piece of cloth through negligent workmanship, the employer delivered to him the damaged cloth and deducted from his wages the value placed by the employer on the cloth. The question arose on an information against the employer for making an illegal payment. The Court reversed the decision of the magistrates who refused to convict, Lindley J. (as he then was) saying that whether there was a payment in goods or a set-off the respondent had infringed the Act. The decision in *Ex parte Cooper* (5) has no bearing on the case before the House. *Lamb* v. *Great Northern Ry. Co.* (6) was a decision on the amending Act of 1887, but the judgment of A. L Smith J. contains dicta on the construction of ss. 2, 3, 4 and 23 of the Act of William IV. which are in the appellants' favour. The judgment of Lord Bowen in *Hewlett* v. *Allen* (7) has already been referred to. That case, however, was decided on the ground that the plaintiff

(1) 2 B. & S. 61.
(2) 8 Q. B. 311.
(3) L. R. 4 C. P. 752.
(4) 3 C. P. D. 109,
(5) 26 Ch. D. 693.
(6) [1891] 2 Q. B. 281,
(7) [1892] 2 Q. B. 662, at p. 666.

H. L. (E.) 1906

WILLIAMS v. NORTH'S NAVIGATION COLLIERIES (1889) LIMITED.

Lord Davey.

had authorized and directed certain payments to be made by the employer on her behalf, and was confirmed in this House (1) on the same ground.

My Lords, the writ in this action claimed payment to each of the appellants of the sum of 10*s.* deducted by the respondents. In the Court of Appeal, by some arrangement between the parties, the appellants confined their claim to a declaration that such deduction was illegal. The Master of the Rolls expressed some doubt whether the Court ought to entertain a suit for a declaration not ancillary to the putting in suit of any legal right. I share that doubt, but as the case has been fully argued and both parties appear to desire the decision of the House upon it, I am not disposed to say more.

I am of opinion that the order appealed from should be reversed, and the appellants and respondents having consented to the hearing in the Court of Appeal being taken as the trial of the action that it be declared that the deduction by the defendants on January 30, 1904, of the sum of 10*s.* from the wages due to the appellants respectively from the respondents at that date was unauthorized and illegal, and that it be ordered that the respondents pay to the appellants their costs of this suit, including the costs of the appeal to the Court of Appeal, and also the costs of this appeal.

Lord Robertson. My Lords, but for the judgment of the Court of Appeal I should have thought the imperative terms of the Act conclusive of this question.

I entirely adopt the reasons given by my noble and learned friends the Lord Chancellor and Lord Atkinson for the reversal proposed.

Lord Atkinson. My Lords, the third section of the Truck Act of 1831 as printed in the revised edition of the statutes runs as follows: "The entire amount of the wages earned by or payable to any artificer . . . . in respect of any labour by him done . . . . shall be actually paid to such artificer in the current coin of this realm, and not otherwise; and every payment made to any such artificer by his employer, of or in respect of such wages,

(1) [1894] A. C. 383.

by the delivering to him of goods, or otherwise than in current coin aforesaid, except as hereinafter mentioned, shall be and is hereby declared illegal, null and void."

Some comment was made on the use in this section of the words "or payable to any artificer." I think these words are introduced for the purpose of meeting a case where some deduction or stoppage authorized by ss. 23 and 24 of the statute has, in fact, been made, and the workman is only entitled to receive the balance of his wages remaining due after that deduction.

It has been urged on behalf of the appellants that such a deduction as that made in this case does not come within the mischief aimed at by the Truck Acts: that those statutes were merely designed to prevent the payment of workmen's wages in equivalents for cash as distinguished from cash itself. It may well be that this was the main purpose and object of this legislation, and that in this particular section the language used extends beyond the mischief aimed at, and reaches comparatively harmless transactions or practices not within the spirit of the statute. Still, there is no ambiguity in the words of the section used. They are precise and clear, and require that the entire amount of the *wages* earned shall be "actually paid in the current coin of this realm, and not otherwise." It cannot, I think, be contended that the withholding by the master from the workman of a portion of the wages earned by the latter against his consent is, or could be, held to be a payment by the master to the workman of that very same portion. It is, in fact, the very opposite of payment. It is a refusal to pay, for the not unnatural reason that an equivalent sum is due to the master by the workman. The requirements of the statute have therefore not been observed in this case. The wages earned have not been paid.

The drawback or stoppage, or deduction, or whatever it may be termed, actually made is not one of those authorized by ss. 23 or 24, yet it is sought to justify the course taken on this ground that, inasmuch as in any action brought by the workman to recover his wages the master would be entitled to set off the debt due to him in reduction of the workman's claim, it is absurd and anomalous to hold that the master cannot, before action brought,

H. L. (E.) 1906

WILLIAMS v. NORTH'S NAVIGATION COLLIERIES (1889) LIMITED.

Lord Atkinson.

make a deduction in respect of the claim which, after action brought, he can successfully rely upon by way of set-off. No doubt, at first sight, there would seem to be much force in this argument, but a little consideration will shew that there may be good reason even for this anomaly. The whole principle upon which this legislation is based is that the workman requires protection, that if not protected he may be over-reached; and it is quite consistent with that principle to hold that in any such action brought by him to recover his wages, he may be liable to have the sum found on investigation before the legal tribunal to be due to him by his master diminished by the sum found by the same tribunal on the same occasion to be due by him to his master, and yet at the same time to prohibit the master from, as it were, substituting himself for the legal tribunal, investigating his own claim against his workman in his own office and deciding in his own favour. In this particular case no doubt the sum sought to be deducted is the amount of a judgment debt, and the danger referred to could not arise; but the argument as to the anomaly which I have mentioned dealt with the general scheme and machinery of the statute, and it was in respect of its general application that I consider it open to criticism.

The several authorities cited appear to me to support rather than refute the contention of the appellants. They may, I think, be roughly divided into two classes; namely, those cases like *Chawner* v. *Cummings* (1), in which charges were made by the employer for the use of the instrument by which the workman did his work and earned his wage; and those like *Hewlett* v. *Allen* (2), in which payments were in effect made by the master out of the wages by the authority of the workman for certain purposes not prohibited by the Truck Acts. In none of these cases was it contended that the master had the right to deduct here relied upon. On the contrary, the effort of the master in each of these cases was to justify the drawback on grounds entirely different from and inconsistent with those relied upon in this case.

In the first class of cases it was successfully contended that the charges made by the master were not deductions properly so called from sums due for wages earned, but were sums to be

(1) 8 Q. B. 311. (2) [1892] 2 Q. B. 662; [1894] A. C. 383.

taken into account in ascertaining the amount of wages actually earned; and in the second class of cases the so-called drawbacks or deductions were justified on the ground that these sums in truth and in fact represented portions of the wages earned, paid in current coin of the realm at the request of the workman to his duly appointed agent.

All the reasoning upon which the several tribunals in the cases cited based their respective decisions would have been unnecessary, and indeed beside the point, if the Truck Act had conferred upon the master the right here contended for, namely, the right to deduct from the workman's wages whatever the master could set off in a suit brought by the workman against him to recover those wages.

It may well be that the appellant has no merits, and that a decision in his favour will enable him to violate his duty with impunity and evade the payment of his just and legally established liabilities; but if that be so, the fault must lie on that "tutelary shelter," to use Lord Bowen's words, which the Legislature has thrown up around the workman, without taking sufficient care so to mould and fashion it that it could not be open to abuse.

I think this appeal must be allowed, with the declaration made in the sense prayed for.

Order of the Court of Appeal reversed, with a declaration that the deduction by the respondents on January 30, 1904, *of the sum of* 10*s. from the wages payable to the appellants respectively by the respondents at that date was unauthorized and illegal, and that the respondents pay to the appellants the costs of this suit, including the costs of the appeal to the Court of Appeal and also the costs of the appeal to this House; cause remitted to the King's Bench Division.*

Lords' Journals, March 20, 1906.

Solicitors: *Smith, Rundell & Dods, for Walter Morgan, Bruce & Nicholas, Pontypridd; Bell, Brodrick & Gray, for D. W. Kenshole, Aberdare.*

[HOUSE OF LORDS]

H. L. (E.) 1906 *March* 26.

PAQUIN, LIMITED . . . . . APPELLANTS;

AND

BEAUCLERK (FORMERLY HOLDEN) . . . . RESPONDENT.

Husband and Wife—Principal and Agent—Authority of Wife to Pledge Husband's Credit—Goods supplied on order of Wife—Contract by Wife "otherwise than as Agent"—Married Women's Property Act, 1893, *c.* 63, *s.* 1—*Order* LVIII., *r.* 4.

The respondent, a married woman living with her husband, ordered articles of dress from the appellants with her husband's express authority and gave the appellants her married name. In an action by the appellants against the respondent for the price the jury could not agree upon the question whether the appellants knew that she was a married woman, and the learned judge entered judgment for the appellants. The Court of Appeal reversed that decision and entered judgment for the respondent on the ground that there was no evidence that she had contracted "otherwise than as agent" so as to bring the case within the Married Women's Property Act, 1893:—

Held, affirming the decision of the Court of Appeal, by Lord Loreburn L.C. and Lord Macnaghten (Lords Robertson and Atkinson dissenting), that it was immaterial whether the appellants did or did not know that the respondent was a married woman, she having as a matter of fact contracted as agent for her husband, and that the respondent was not liable.

THE respondent in 1902 and 1903, while living with her husband, Mr. Holden, bought wearing apparel from the appellants under the circumstances related in the judgments of Lord Loreburn L.C. and Lord Macnaghten. The appellants having brought an action against the respondent to recover 245*l.* for the apparel, the jury were unable to agree, and Lawrance J. entered judgment for the plaintiffs for that amount. The Court of Appeal (Collins M.R., Mathew and Cozens-Hardy L.JJ.) reversed this decision, and entered judgment for the defendant. Hence the present appeal. (1)

(1) It will be seen that the decision of the Court of Appeal turned mainly on the proper inference to be drawn from the facts as to the plaintiffs' knowledge that the defendant was a married woman, and acting as agent for her husband, but it has been thought that it would be convenient

Feb. 22, 23. *Isaacs, K.C.*, and *Lush, K.C.* (*Groser* with them), for the appellants.

The respondent ordered the goods in her own name and for

to readers that the following note of the judgments in the Court of Appeal should be appended to this report. In *Att.-Gen.* v. *Dean of Winchester*, (1860) 8 H. L. C. 369, p. 392, and *Beamish* v. *Beamish*, (1861) 9 H. L. C. 274, p. 338, Lord Campbell L.C. appears to have said that a decision of the House of Lords, the Lords being equally divided, was as binding upon the House itself, and upon all inferior Courts, as if it had been pronounced nemine dissentiente.

COLLINS M.R. This is an appeal brought by the defendant in an action which came on for trial before Lawrance J. with a special jury. The jury differed, and on further consideration the learned judge nevertheless entered judgment for the plaintiffs. Against that judgment the defendant now appeals.

The action is brought by a firm of milliners called Paquin, Limited, against the defendant, who is a married lady, for the price of articles of ladies' dress sold on credit to the defendant. The defence was that these goods were bought by the defendant as agent for her husband; that they were goods that would be described in point of law as necessaries, that is to say, articles of dress suited to the position which with her husband's authority and consent she maintained; and, furthermore, that she had bought them by the direct authority of her husband, he knowing beforehand of the fact that she was going to purchase them, and having seen and approved of them after she purchased them. Evidence was given on both sides. There was no dispute that the defendant was a married woman, and that she was living with her husband, and that cohabitation was existing, but the great point made for the plaintiffs was that they were not aware of the fact that she was a married woman. On that issue the jury could not agree, and, though the learned judge had in the first instance thought there was evidence fit for the consideration of the jury upon the point, when the jury failed to agree, and the matter came before him upon further consideration, he ruled that there was no evidence that the plaintiffs were aware of the fact that this lady was a married woman, and that judgment must be entered for the plaintiffs.

The defendant's application is for judgment or for a new trial. That there must be a new trial, unless we are in a position to enter judgment, seems to me to be quite clear. Judgment having been given for the plaintiffs where the jury disagreed, and where there was, in my opinion, abundant evidence to go to the jury upon the point, it is quite impossible to refuse a new trial, but the question really is whether we are not bound upon the admitted facts to order judgment to be entered for the defendant. I have come to the conclusion that we should be doing wrong to send this case back to be retried where there is no real controversy as to the facts, which are all ascertained before us, and where the only matter for consideration is whether, taking all these facts as proved, the necessary inferences arising therefrom do not entitle the

H. L. (E.) her own personal use. There was no evidence that she was

1906

PAQUIN, LIMITED v. BEAUCLERK.

defendant to judgment in point of law. In my opinion they do.

Let us consider what are the admitted facts. They are that this lady was undoubtedly a married woman, and was living with her husband at the time when the goods were supplied at a place which we are told is one of the largest and handsomest places in England, called Easthampstead Park, Wokingham, and that was the address which she gave to the plaintiffs. The articles which she ordered from the plaintiffs were on the evidence not only necessaries in point of law, having regard to the standard of life which, by her husband's consent and concurrence, she was assuming, but, on the uncontradicted evidence, not cross-examined to, were ordered with the express sanction and authority of her husband. On inquiry by the plaintiffs to whom the goods were to be addressed, they were told that she was Mrs. Vincent Holden. It is true the name "Vincent" does not appear. I suppose she gave the initial when she wrote out the address, and the "V" got confounded with "E," and it got written down in the plaintiffs' ledger as "Mrs. E. Holden." After the first order was given, which was, I think, for a hat, the question arose, which always, I understand, comes up in this establishment, and has to be decided by the manager, who was the person who alone has the responsibility of determining it, whether this hat should be allowed to go out on terms of credit, or whether cash should be demanded in exchange for the goods. The lady was introduced by a very well-known customer of the plaintiffs, another lady, and the manager decided, having got the facts before him, that the goods should be sent out on credit. In due course, a cheque was received from the lady signed "May Holden." The entry in the ledger, under the details of the order, of the name of the person who gave it was, as I have said, "Mrs. E. Holden." Under that and beside it they put in the details of the cheque, namely, "May Holden," clearly indicating that "E. Holden" was not May Holden, and, therefore, that the defendant was probably a married lady, her husband being Mr. E. Holden, and she herself Mrs. Mary or May Holden. That was the first transaction; she continued to deal at the place, and ultimately the goods which are the subject-matter in this case were ordered by her and were not paid for. Her husband became bankrupt, and the action is brought against the lady herself.

Now, did the lady contract as agent or not? Most unquestionably on the uncontradicted evidence she contracted as agent in fact with the express authority of her husband, and, even apart from that express authority of the husband, in my opinion on the facts admitted by the plaintiffs' manager, who sold the goods or allowed them to go out on terms of credit, as to the circumstances under which the orders were given, the contracts were in their inception prima facie contracts by her as a wife on behalf of her husband. The plaintiffs' manager was cross-examined upon the point. After a good deal of struggling on his part, he admitted that he did not in point of fact regard this lady either as a single woman or a widow,

contracting for her husband, or even that the appellants and he was ultimately brought to the conclusion that he was not prepared to say that he really thought that she was a single woman or that she was some person assuming a rank that was not her own, or that she was a widow, leaving open the only remaining inference, namely, that she was a married woman. Under those circumstances, it seems to me, prima facie this was the case of a sale to a lady acting in the ordinary capacity of a married lady living with her husband, and ordering, it might have been bread, or butcher's meat, or anything necessary for the household, and, therefore, the contract on its face, prima facie was a contract of agency and not a contract in which she gave her own personal liability to the seller.

Now, under these circumstances, how stands the law? In the Married Women's Property Act, 1882, s. 1, sub-s. 3, it is provided as follows: "Every contract entered into by a married woman shall be deemed to be a contract entered into by her with respect to and to bind her separate property, unless the contrary be shewn." Undoubtedly this enactment introduced a very wide departure from the common law; for at common law a married woman had no separate status from her husband, and contracts made by her were his contracts or nothing, but that enactment was modified by the Married Women's Property Act, 1893. By s. 1 of that Act it was provided that: "Every contract hereafter entered into by a married woman, otherwise than as agent, (*a*) shall be deemed to be a contract entered into by her with respect to and to bind her separate property whether she is or is not in fact possessed of or entitled to any separate property at the time when she enters into such contract." By s. 4 of the Act sub-ss. 3 and 4 of s. 1 of the earlier Act were repealed. Therefore, it seems to me that, if this contract was one made by the defendant as agent, we get back to the common law of this matter, and there is no implication of liability upon the defendant at all. In point of fact she never had any separate estate, but that is not necessary to the observation I am now making. We get back to the common law, and it seems to me that from the provisions of the statute it is clear that the point is not whether the contract purported on its face to be made by the married woman as principal, but whether in point of fact it was made by her otherwise than as agent. Here there is no doubt whatever that this contract was made by her as agent, and, even if the inference from the contract, if written down, might, as regards its terms, have admitted of a possible personal liability, I do not think that is the crucial point. The crucial point is, Was it a contract of agency in fact, not in semblance or in form? Even if I were asked to say what the form of this contract should have been, if it had been written down, I think the proper form on the admitted facts would have been one which would have shewn that she was contracting for the husband and not on her own personal liability. However, be that as it may, it seems to me clear in this case that this was not a contract by the defendant otherwise than as agent. Therefore

H. L. (E.) 1906

PAQUIN, LIMITED v. BEAUCLERK.

knew that she was a married woman. The Married Women's

---

a case of liability has not been established against this lady.

That really is enough to dispose of the case, but although I think that is conclusive, I am not sure that the case cannot stand independently of the statute, because we have now the admitted facts, and I do not see that there is any question which would really be fit to be left to the jury upon which their decision would depend. We have the circumstances under which the contract was made, which are not in controversy, and the result of those facts is, in my opinion, that the contract was one which in its inception was known to be one of agency. The seller for very good reasons did not risk making any inquiries addressed to the lady herself, which he knew perfectly well would be imprudent on his part to make, but that he dealt with her on the faith of her being anything other than she was seems to me to be excluded by the admitted evidence in the case. He was under no illusion as to her position. He did not care to inquire too closely into it or into what risk there was, but if there was any risk about it, he accepted the risk of her not being a married woman, and contracted with her on the footing that she was a married woman. Therefore it seems to me that there is no evidence on any controverted point upon which the verdict of the jury could assist us in this matter. The contract was clearly a contract made by the defendant as agent, apart from the statute altogether; this lady dealt, not as principal but as agent, and did not give her own liability, but the liability of her husband; and knowing very well that, the husband being a bankrupt, it was inadvisable to take proceedings against him, the plaintiffs thought fit to treat this lady as the principal in the transaction, when on the admitted facts she was nothing more than an intermediary between them and her husband.

Under those circumstances it seems to me we should be wrong to subject the parties to the expense of further litigation in the matter. We are bound to express our view of what the law is, and in my judgment, independently of the statute, the defendant is entitled to have judgment entered for her in this case.

MATHEW L.J. I am of the same opinion, and I agree with the reasons given by my Lord. We have to deal with this case upon the footing of the evidence given and the statements we have heard with reference to the defendant and her husband. It appears that the husband, who was then possessed of very large means, had a fine establishment at a place called Easthampstead Park, where his wife, the defendant, lived with him as the head of his household, and was supplied by him with whatever means she wanted to discharge the obligations of her position. She was provided with the means of discharging the obligations of the household by an account opened in her name, which is practically the same thing as though the husband handed her bank notes to pay the amount of any liabilities incurred by her in the management of the establishment and the home. Now, that being the position of things, it is not possible to entertain any doubt that this lady was the agent of her

Property Act, 1893, has removed difficulties out of the way of husband, to enter into contracts that he authorized, the obligations of which he discharged with his money from time to time. It could not be contested that, as between her and her husband, she was agent for him. Now, while they were staying at this very handsome place, the first transaction took place between the plaintiffs' firm and Mrs. Holden. The plaintiffs are a firm of milliners in a very large way, and, having regard to the nature of their business, that they should possess no information whatever as to the law of husband and wife in connection with transactions in the course of that business would be very astonishing, and to my mind out of the question. This lady is introduced to them by an old customer, a person in good social position apparently. On that the first order was given. Of itself it was not an order that indicated extravagance of any sort, having regard to persons in the distinguished position that this lady and gentleman were keeping up. The order was taken down in the ordinary way by a saleswoman, and there appears to have been a mistake about the initial. No doubt Mrs. Holden said, when she was asked her name, "Mrs. Vincent Holden," or "Mrs. V. Holden." At any rate, it was taken down as "Mrs. E. Holden." The order was passed on in the ordinary way to the manager of the firm, whose only duty was to ascertain whether or not the goods should be delivered on credit or only for cash. He had no hesitation whatever on the information given him in ordering that the goods should be supplied on credit. That was done, and they were paid for in ordinary course. The cheque was signed "May Holden." She said that she was Mrs. Holden, of Easthampstead Park; those facts were stated and no inquiries were made. I quite agree no inquiries could well be made as to this lady, of the lady, or of her companion. The order was executed. Without a word on that subject, the goods were supplied; but, although there was no obligation to make any inquiry of the defendant, there was nothing to forbid or prevent inquiries being made elsewhere. For a time it was suggested to us that no inquiries of any sort were made; that the plaintiffs were left completely in the dark, and, therefore, must be assumed to be dealing with the lady whose personal responsibility was taken. But it was not true that they did not make inquiries. I suppose no great establishment of this kind does make inquiries of their customers, but I suppose there is a system of reference with regard to all new customers in a case of this sort. Here the trade societies were appealed to and asked as to the former transactions of this lady, and information was given as to certain transactions. There was nothing at all to suggest the lady was going beyond what she was entitled to. It is very significant that no inquiry should have been made about the husband. The plaintiffs may not have heard about Mr. Vincent Holden, or they may not have known a great deal about him. If they did not, why did not these people, who knew the difficulties of their position with regard to the wife, ask anything about the husband? I should have thought it was clear they did not ask because they knew

H. L. (E.) 1906

PAQUIN, LIMITED v. BEAUCLERK.

creditors. Under the Act of 1882 it was necessary, in order just as much as they cared to know about him. Then what occurred subsequently was this: the lady went on in the ordinary course paying cheques from time to time; the transactions were not by any means extravagant, and there was no difficulty whatever between her and the plaintiff firm. Now under these circumstances various problems were put to us by Mr. Lush. He said that the plaintiffs were left in the dark; that the defendant might have been a divorced woman, or might have been a lady living apart from her husband; that she might have had no title to be called Mrs. Holden, and that the plaintiffs are entitled to say that they were not informed on that subject, and were misled. This suggestion seems to me quite untenable. She might have been what she really was, namely, the agent for her husband, and, if so, the plaintiffs cannot complain. As they did not inquire into her status they must take the lady as she really was, namely, as the agent of her husband. They cannot say they were misled, or that they ought to consider themselves misled by anything that passed. There was a suggestion that information ought to have been given them by the lady; that it was incumbent on her to explain to the plaintiffs clearly what her position was. I have not heard any authority whatever for any such proposition She was an agent, and clearly an agent, and her position cannot be altered unless she has done something to alter her position from agent to principal. There is no evidence whatever, so far as I can see, of any act on her part entitling the plaintiffs to say that they have been misled, and it seems to me there was no obligation on the defendant to give them any information as to a matter upon which they did not inquire. The position appears to be this, that they did not ask, because really they had no misgivings but that somehow or other the money would be forthcoming, whoever they were contracting with. If the plaintiffs had inquired I have not the slightest reason to doubt that the defendant would have told the exact truth—that she was the wife of Mr. Vincent Holden, living at Easthampstead Park, and had command of as much as she wanted to discharge her obligations as his wife.

It was said that the plaintiffs were misled, and were entitled to suppose they were contracting with the defendant as a principal, from the fact that from time to time she gave cheques signed with her own name. That is quite consistent with the defendant's case. She gave those cheques because the funds were being supplied her, to enable her to draw cheques upon them, by her husband. That is exactly what one would have expected with reference to an establishment of this sort, and the course of business that would have been followed, namely, that an account was opened in the name of the wife to enable her to discharge the obligations of the household. It was said in this case that the great majority of ladies who dealt with the plaintiffs' firm did pay by cheques in their own names, but certainly that is not conclusive, and is indeed no indication of the fact that they had private means, and, therefore, were to be trusted to be able to discharge out of their own resources any obligations

to create liability, that the married woman should have separate

that they contracted. I should have thought the conclusion was perfectly clear that this lady never intended to pledge her credit, and that the plaintiffs never intended to treat her as having pledged her credit to them. To my mind there is no evidence whatever to justify any such conclusion.

I quite agree, with reference to the law, with the construction which my Lord has put upon the Act of Parliament in question. It does not, however, appear to me necessary to decide this case upon the Acts of Parliament. Apart from them, at common law, and without any reference to any statute, it seems to me the defendant's position is perfectly plain, for, as I have said, I agree with my Lord that there is no evidence that the defendant intended to pledge her credit or that the plaintiffs ever intended to treat her as personally responsible to them. What position would they have been in if the husband had continued to be a prosperous man? Can there be any doubt that they were in a position to maintain an action against him? What answer could he have possibly made to it? None. That is the position. It is only because he has failed that they seek to make the lady bear the obligation. I agree with my Lord that judgment must be entered for the defendant.

COZENS-HARDY L.J. I am of the same opinion, and I entirely agree with the reasons assigned by the Master of the Rolls. I should like, however, to add a few words. It is clear, I think, that the plaintiffs cannot succeed at common law, and they have no right of action at all unless they can bring themselves within s. 1 of the Act of 1893.

Now the admitted facts here are that this lady, the defendant, did not intend to contract otherwise than as agent for her husband. She had not a sixpence of separate estate, and she swore that she thought she contracted only as agent. There is no possible reason to doubt that what she says is true. But it does not merely rest upon that statement of her intention; she swore, and there was no cross-examination to it, that her husband knew she was going to order these goods, and that he saw them after she had ordered them. I think on the admitted evidence it is clearly proved as a fact that she was entering into this contract really as agent for her husband, whether the plaintiffs did or did not know it. If that be so, how can the plaintiffs bring themselves within s. 1 of the Act of 1893? That section only applies to "Every contract hereafter entered into by a married woman otherwise than as agent." This was a contract entered into by her as agent. That being so, it seems to me the plaintiffs cannot claim the benefit of this Act. Of course, in saying that I do not wish for one moment to forget that a wife may so conduct herself, and may make such a statement or do such an act as to preclude her from telling the truth, to estop her from saying she did contract as agent. But there is in the evidence in this case nothing, as it seems to me, which lends any colour to any such suggestion. She said she gave her name, "Mrs. Vincent Holden," or "Mrs. V. Holden," I care not which. The plaintiffs' manager says he had no

H. L. (E.) 1906 PAQUIN, LIMITED v. BEAUCLERK.

property at the time the contract was made: *Palliser* v. *Gurney* (1); *Stogdon* v. *Lee*. (2) For the form of a judgment against the separate property see *Scott* v. *Morley*. (3) Now, by the Act of 1893 the liability attaches to future separate property, though the married woman had none at the date of the contract; secondly, the burden of proof is shifted. The Act of 1893, s. 1, provides: "Every contract hereafter entered into by a married woman, otherwise than as agent," is to bind her separate property present or future. The words "otherwise than as agent" shew that agency must be proved in order to escape liability. The Court of Appeal assumed that agency must be inferred where husband and wife are living together. The respondent certainly did not purport to act as her husband's agent. She gave her own name and paid with her own cheques. The title "Mrs." proved nothing—she might have been a widow, or a spinster, for all the appellants knew. Exclusive credit was given to the respondent, and there was no evidence of the husband's authority. If the respondent was an agent, she was so for an undisclosed principal, and is therefore personally liable. In this view judgment should be entered for the appellants. Failing that, the appellants are entitled to the verdict of a jury on the questions whether the appellants knew she was married and cohabiting with her husband, and had his authority to pledge

---

doubt that she was either a married woman or a widow, and he did not assume that she was either one or the other. Under those circumstances it seems to me impossible to say that there was anything at all said or done by the defendant which prevented her from telling the truth, which is, that she contracted as agent for her husband. That being so, it seems to me that the very foundation of this action fails. I do not desire in the least to differ from the view of my Lord and of Mathew L.J., that, even if that were not so, the liability in this case could not be enforced against the lady.

I do not at all accede to the view, which was rather pressed upon us by Mr. Montague Lush, that the Married Women's Property Acts have, in fact, altered altogether the presumptions of law arising out of the status of marriage coupled with cohabitation. I do not think that at all. I think those presumptions remain in full force and effect, and must be applied now in the same way as before the Married Women's Property Act was passed. For these reasons I agree with my Lord, that the appeal should be allowed and that judgment should be entered for the defendant.

(1) (1887) 19 Q. B. D. 519.

(2) [1891] 1 Q. B. 661.

(3) (1887) 20 Q. B. D. 120, 132.

his credit; and whether he approved of her buying those clothes. Upon these questions the Court of Appeal were not warranted in assuming the function of a jury. There ought, therefore, to be a new trial. The appellants could not sue the husband; he had supplied his wife with large sums to pay for her clothes, and she had no authority to pledge his credit: see *Debenham* v. *Mellon*. (1) There the husband made the wife an allowance, and it was held in this House that the mere fact of marriage and cohabitation did not raise the presumption of agency. Here the Court of Appeal acted merely on that presumption. In *Morel* v. *Earl of Westmorland* (2), where the husband gave his wife an allowance, Lord Halsbury L.C. said that the plaintiffs "might have sued either the agent or the principal."

Bankes, K.C., and *Norman Craig*, for the respondent.

The Court of Appeal has power under Order LVIII., r. 4, to draw inferences of fact and enter judgment instead of ordering a new trial: *Millar* v. *Toulmin* (3); *Allcock* v. *Hall*. (4) The evidence justified them in drawing the inferences that the respondent was married and living with her husband; that the articles, being wearing apparel, were necessaries; that she had no separate property or allowance; and that the goods were ordered by her husband's express authority. Though the principal's name was not disclosed, parol evidence may be adduced to shew his liability: *Calder* v. *Dobell*. (5) The plaintiffs must shew that the wife did or said something to estop herself from relying on her husband's liability. It is necessary for the plaintiffs to prove such estoppel: *Morel* v. *Earl of Westmorland*. (2) Both before and since the Married Women's Property Act a married woman's contract binds, not herself personally, but her separate estate: *McHenry* v. *Davies* (6); *In re Grissell*. (7) The respondent never had any separate property. The wife's agency for her husband is presumed in the ordinary circumstances of married life: *Debenham* v. *Mellon*. (8) No doubt the presumption is prima facie and not absolute—not a

(1) (1880) 5 Q. B. D. 394; 6 App. Cas. 24, 31, 36.
(2) [1904] A. C. 11.
(3) (1886) 17 Q. B. D. 603.
(4) [1891] 1 Q. B. 444.
(5) (1871) L. R. 6 C. P. 486.
(6) (1870) L. R. 10 Eq. 88.
(7) (1879) 12 Ch. D. 484, 490.
(8) 6 App. Cas. 24, at p. 32.

H. L. (E.) 1906 PAQUIN, LIMITED v. BEAUCLERK.

presumption of law, but one capable of being rebutted. In the absence of rebutting evidence the husband is liable. Ignorance as to the relation of agency thus established between the respondent and her husband will not avail the appellants: *Atkins* v. *Curwood* (1); *Jewsbury* v. *Newbold.* (2)

Isaacs, K.C., in reply. There may be a presumption that there is authority: there is none that it has been exercised. The doctrine laid down by Lord Halsbury in *Morel* v. *Lord Westmorland* (3), and by Lord Selborne in *Debenham* v. *Mellon* (4), applies to all cases of principal and agent. The mere intention of the respondent to act as her husband's agent can have no effect: *Keighley, Maxsted & Co.* v. *Durant.* (5)

The House took time for consideration.

March 26. LORD LOREBURN L.C. My Lords, this is an action brought by a firm of dressmakers against a lady, who at all material times was a married woman living with her husband, to recover the price of certain articles of dress. The articles were ordered in the months of April, May and June of 1903. When their dealings commenced nothing was said on either side to indicate upon whose credit they were to be supplied, whether that of the husband or of the wife. The plaintiffs debited the lady in the name of Mrs. E. Holden, evidently a mistake for Mrs. V. Holden, and were paid by her cheque for such goods as were paid for. They have never claimed against the husband. It is their custom to debit the lady who gives an order and to ask no questions. They are entitled to carry on their business in this way, but if they do so they must take their chance of the status of those with whom they deal, and of the consequences which the law affixes to that status.

It will be convenient to state first what I understand to be the law applicable to the present case. At common law the general rule, with exceptions not relevant to the present purpose, is that a married woman is incapable of contracting on her own account and cannot be sued alone. But she might contract as

(1) (1837) 7 C. & P. 756.
(2) (1857) 26 L. J. (Ex.) 247.
(3) [1904] A. C. 11.
(4) 6 App. Cas. 24, at p. 32.
(5) [1901] A. C. 240.

agent for her husband. In equity a married woman possessed at the time of separate estate not subject to restraint against anticipation (I will call it free separate estate) could make contracts enforceable against her separate estate, but not enforceable against herself personally. Such being the state of law and equity, it is manifest that the present plaintiffs could not, apart from statute, have sued the defendant at law at all, because she was a married woman. Nor could they have sued her in equity, because, in fact, she had no separate estate. It was not argued that she had, and it could not have been argued, because all the evidence is that she had none.

Accordingly, in order to succeed the plaintiffs must rest their case upon statute. Two Acts of Parliament have been relied upon. One of them is the Married Women's Property Act of 1882. A portion of that Act has been repealed, still s. 1, sub-s. 2, remains, and under it a married woman can be sued as if she was a feme sole, and may also contract as such. But it has been held, properly I think, that this right to contract only exists where the married woman has separate property at the time. So far, therefore, as the present case is concerned the Act of 1882 does, indeed, authorize the action being brought against a defendant in her own name, but it does not give any effective remedy against her or entitle the plaintiffs to judgment as soon as it appears that she had no separate estate at the time of the alleged contract. The second Act relating to this subject is the Married Women's Property Act of 1893. The only chance of the plaintiffs is to bring their case within that Act.

The Act of 1893 provided that all the present or future separate estate of a married woman should be available to answer every contract she might enter into, where she entered into it "otherwise than as agent." It does not signify under this Act whether or not she had separate estate at the time. If she was acting as an agent, the Act of 1893 will not apply. If she was acting otherwise than as agent, then the Act will apply. I think it is clear that the plaintiffs are entitled to succeed in the present case if Mrs. Holden ordered these goods on her own account, and equally clear that they must fail if she ordered them as agent of her husband.

H. L. (E.) 1906 PAQUIN, LIMITED v. BEAUCLERK. Lord Loreburn L.C.

Mr. Isaacs argued that, in order to prove that she entered into the contract as an agent, a married woman must establish, not merely that she was, in fact, an agent for her husband, but also that the other contracting party knew it, and contracted with her on those terms. I cannot adopt that view. The Act of 1893 does not mean that a married woman's separate estate is to answer her contracts unless both parties to the contract deal on the footing that she is an agent. It means, in my opinion, that the separate estate is not to answer when, in fact, she entered into the contract as an agent.

Before the Act was passed a tradesman could fix a husband with liability for a debt contracted by his wife, if he could prove either express or implied authority from the husband. It was immaterial whether at the time the contract was made the tradesman knew that the wife had her husband's authority, or even knew that she was a married woman. The knowledge of the tradesman was immaterial. I think it is equally immaterial under the Act of 1893.

It is now necessary to advert to the course of the trial. Evidence was given by the plaintiff's manager and also by the defendant, and a variety of issues were raised. They were embodied in five questions left by Lawrance J. to the jury. The jury could not agree upon a verdict, and in the end the learned judge, in the hope of sparing the parties the expense of a new trial, entered judgment for the plaintiffs. When the case came before the Court of Appeal that judgment was reversed, upon the ground that there was no evidence of the defendant having entered into a contract otherwise than as an agent. That was the substance of the decision, although some of the learned judges in the Court of Appeal expressed opinions and purported to arrive at findings upon the evidence, some of which seem to be appropriate rather for a jury than for a Court.

It was argued by Mr. Bankes that even if there had been some evidence that the defendant contracted otherwise than as an agent the Court of Appeal would in this case have been at liberty under Order LVIII., r. 4, to draw their own inferences of fact and to enter judgment accordingly. The proper construction of Order LVIII., r. 4, has been the subject of criticism in *Millar* v.

Toulmin (1) and *Allcock* v. *Hall.* (2) In the latter case all the judges of the Court of Appeal concurred in the opinion that they were at liberty to draw inferences of fact and enter judgment in cases where no jury could properly find a different verdict. Obviously the Court of Appeal is not at liberty to usurp the province of a jury; yet, if the evidence be such that only one conclusion can properly be drawn I agree that the Court may enter judgment. The distinction between cases where there is no evidence and those where there is some evidence, though not enough properly to be acted upon by a jury, is a fine distinction, and the power is not unattended by danger. But if cautiously exercised it cannot fail to be of value.

In the present case I think the Court of Appeal came to a sound conclusion. The only decisive question was whether the defendant made this contract as agent for her husband. Or, to put the same thing in other words, had she his authority, express or implied? In my opinion the evidence, which was uncontradicted and not impugned by cross-examination, leaves it beyond reasonable doubt that she did act with his authority. There was no evidence the other way. That is sufficient to dispose of her case.

I desire to add that while agreeing with the Court of Appeal in this particular conclusion of fact I think, as at present advised, that some of the inferences of fact which were drawn by the judges in the Court of Appeal were matters on which, as the evidence stands, a jury might reasonably have found either way.

Lord Macnaghten. My Lords, I agree with the judgment which has just been delivered by my noble and learned friend on the woolsack.

The material facts and circumstances of the case are, I think, beyond controversy, and the question at issue, in my opinion, lies in a very narrow compass.

A married woman had dealings with Paquin, Limited, who carry on a large business in Dover Street as milliners and dressmakers.

(1) 17 Q. B. D. 603; (1887) 12 App. Cas. 746.

(2) [1891] 1 Q. B. 444.

H. L. (E.) 1906 PAQUIN, LIMITED v. BEAUCLERK. Lord Macnaghten.

She was introduced by an old customer. The manager apparently made some inquiries of one or more trade protection societies, and came to the conclusion that the lady might be supplied with goods on credit. On that footing she dealt with the firm and became a regular customer. The articles which she ordered were charged to her account. The bills were sent in to her, and for a while she paid regularly by her own cheques. After about twelve months' time the lady's husband, who had been living for a good many years with a vast show of wealth, was found to be utterly insolvent. He absconded. And then this action was brought against the lady for the balance remaining unpaid on her account.

In answer to interrogatories the lady admitted that when she ordered the goods (referring, I presume, to the inception of the transaction) she did not state whether she ordered them on her own behalf or on behalf of any other person, and she admitted that she did not say that she was a married woman—in fact, as one would expect, she merely gave her married name and her address. The name and the address were given correctly.

The manager at the trial stated that he did not make any inquiries about the husband, and that he "did not think about him." He said, too, that he had "considerable experience in giving credit to ladies in the West End," and that there they "always treated a lady as a principal, not an agent." I see no reason to doubt the manager's statement. In such a case (to borrow Lord Bramwell's words in *Debenham* v. *Mellon* (1), I may say "I very much doubt whether the tradesman has any intention of trusting the husband. He hopes and expects that somehow the wife will get the money and pay for the goods without the husband knowing anything about the matter."

The lady swore that she had no separate estate or separate income of any kind. She said that her husband from time to time paid money to an account which he allowed her to open with the London and County Bank for the purpose of defraying household expenses and other claims upon him and the bills for what she bought for her own use. She said that she had her husband's express authority for dealing with Paquin, Limited,

(1) 5 Q. B. D. 394, at p. 399.

and she added that the dresses which she bought were worn in her husband's presence. This evidence was not contradicted, nor was her testimony shaken in cross-examination.

Now, if this transaction had occurred just before the passing of the Married Women's Property Act, 1893, there cannot, I think, be the slightest doubt what the result of an action by the tradesman would have been. It must have been held that the lady entered into the contract as agent. The husband, and the husband alone, would have been liable. The lady would not have been liable either at law or in equity, and as she had no separate estate at the time she could not have been brought within the Married Women's Property Act, 1882: *Stogdon* v. *Lee*. (1) It seems to me that after the passing of the Act of 1893 such a transaction is still a contract of agency and nothing else. Whatever was necessary and sufficient before the Act to make a transaction entered into by a married woman a contract of agency is, I think, necessary and sufficient to make a transaction entered into under similar circumstances a contract of agency now. In order to exempt a married woman, who is in fact an agent, from the very serious consequences of a judgment against her in respect of future separate estate when she has no separate property at the time, it is not required by the Act of 1893 that she should communicate to the person with whom she is dealing the fact that she is her husband's agent, or state that she is not acting on her own behalf, or declare that she is married and cohabiting with her husband, or confess that she has not a sixpence in the world which she can really call her own. It can hardly be expected that such domestic confidences should be whispered across the counter or imparted to some forewoman in the comparative privacy of an inner apartment. I cannot imagine that Parliament could have meant to impose on married women a task so novel and so disagreeable. The only object of the 1st section of the Act of 1893 was, I think, to correct or reverse the decision of the Court of Appeal in *Stogdon* v. *Lee* (1), and to repeal the provision of the Act of 1882, which threw upon a married woman the burthen of shewing that her contract did not bind her separate estate.

(1) [1891] 1 Q. B. 661.

H. L. (E.) 1906 PAQUIN, LIMITED v. BEAUCLERK. Lord Macnaghten.

There is really no hardship on the tradesman who deals with a married woman. He is under no obligation to give credit at all, or to continue or extend the credit, if credit is given. He may make any inquiries he pleases of the customer or of anybody else. If he chooses to trust a lady with unlimited credit, when he is not sure of his ground, he has only himself to blame if anything should go wrong.

The learned judge told the jury that the real question was whether the manager knew that the lady was a married woman. I venture to think that that question is not material. The only question, as it seems to me, is whether the contract was entered into by the lady "otherwise than as agent." That is a question of fact. Unless the affirmative is shewn the Act does not apply. In the present case, inasmuch as it has been proved that the lady had her husband's express authority to act as his agent and did so act, and it is not suggested that there was any misrepresentation on her part, I think the view of the Court of Appeal is right. No jury, I think, could properly have come to any other conclusion on the evidence.

I do not myself agree with all the inferences of fact drawn by the Master of the Rolls and Mathew L.J. I agree entirely with the judgment of Cozens-Hardy L.J.

I think the appeal ought to be dismissed with costs.

LORD ROBERTSON. My Lords, in my opinion, the law governing this case is the 1st section of the Married Women's Property Act, 1893, and I quote the words which state the new rule set up for married women's contracts: "Every contract hereafter entered into by a married woman, otherwise than as agent, shall be deemed to be a contract entered into by her with respect to, and to bind her separate property, whether she is or is not, in fact, possessed of or entitled to any separate property at the time when she enters into such contract." The plain result of this enactment is that, unless the respondent entered into this contract as agent for her husband, she is liable to the appellants. Whether she entered into the contract as agent seems to me the only question in the case, and, the facts being perfectly free from dubiety, that question is one of law.

The facts which are relevant are these: The lady was living with her husband; she had his authority to buy such articles as those in question, and he knew of their purchase at least after it had been made. On the other hand, it is equally certain that the appellants did not know that the respondent had a husband living, or that she was living in cohabitation with him. The respondent manifested herself to the appellants merely as "Mrs. V. Holden," and they had no further or other knowledge of her status. It is obvious that this name was entirely consistent with her being a widow or a separated married woman, and that it was therefore insignificant on the question of agency. No circumstance or scintilla is suggested as raising a jury question whether the appellants did not in fact know that the respondent had a living husband and was living with him.

In these circumstances, what the respondent relies on is the undisclosed fact that she had her husband's authority; and the question of law is whether this is enough to make the contract that of an agent. In my opinion it is not, and the point may, as I think, be subjected to a very simple test, Did the appellants deal with the respondent as an agent? As already stated, they certainly did not, for they never heard of the existence of a husband. This being so, I find it legally impossible to hold that the respondent contracted as an agent; for, unless both parties regarded the respondent as an agent, she did not contract as agent.

It seems to me that, prima facie, every person who contracts contracts for himself or herself. The application of this to those who de facto hold the powers of agents is thus stated in 1 Smith's Mercantile Law, 10th ed. p. 173: "If any agent contract without disclosing that he has any principal, he is himself the person prima facie responsible."

In the present case, where the respondent affected and purported to stand on her own feet vis-à-vis to the appellants, and did not apprise them of anything about herself to suggest agency, she must be held to have contracted personally. And the 1st section of the Act of 1893 places beyond dispute the capacity of a married woman to contract personally, and places the case of agency in antithesis and exception to the primary case of contract, viz., personal contract.

My Lords, I have stated my view shortly, and I feel that it would be superfluous to protest the irrelevancy of several

H. L. (E.) 1906 PAQUIN, LIMITED v. BEAUCLERK. Lord Robertson.

suggested topics. Thus, it is surely unnecessary to deprecate such phrases as that this lady contracted in her married name (as if she had the choice of two names either of which she could truthfully give to a tradesman). Again, the question before the House being solely whether this lady is liable, it is nothing to the purpose to prove that an undisclosed principal might also be liable.

The only hesitation which I feel about the case is whether it is permissible to withhold it from further trial by jury. But a careful examination of the evidence has satisfied me that there are no questions of fact remaining in dubio, and that the sharp question of law which I have discussed is decisive of the controversy.

I am therefore for allowing the appeal and finding the appellants entitled to judgment, with costs.

LORD ATKINSON. My Lords, I have had the advantage of having read the judgment of my noble and learned friend Lord Robertson, and I concur in it.

I do not think that the 1st section of the Married Women's Property Act of 1893 protects, or was intended to protect, from liability a married woman who enters into a contract apparently as principal, though she may in fact be only agent for an undisclosed principal. If the other party to the contract should discover that she was in fact an agent for an undisclosed principal, he may, I think, sue the principal just as he could sue him if the married woman were a man or a feme sole, but if he should elect to sue her I do not think she could escape liability on the plea that she was in fact agent, though at the time the contract was entered into she neither disclosed that circumstance nor mentioned any facts from which the inference would naturally and reasonably be drawn. The liability of the husband on the wife's contract is governed by the general principles of the law of principal and agent. He cannot be held responsible for goods supplied to her unless he has expressly or impliedly authorized her to act as his agent, or ratified the contract she has professed to make on his behalf, or conducted himself in such a way that he would be estopped from denying that she was his agent.

One mode by which this authority of the wife to act as the agent of the husband can be established is by proof of two facts:

(1.) that she is living with him; and (2.) that the goods ordered or supplied are of such a character and nature as are usually required in those departments of domestic life and economy which the wife ordinarily manages and controls.

The tradesman who sues the husband for goods supplied on the order of the wife will, on proof of those two facts, though they may have only come to his knowledge after the contract was made or the goods supplied, have laid before a jury evidence which, if unexplained or unrebutted, would justify them in drawing the inference of fact that the wife had authority to act as the agent of the husband: see Thesiger L.J.'s judgment in *Debenham* v. *Mellon*. (1) That inference may be rebutted in several well-known ways independently of any statute, and amongst others by evidence from which the jury might draw the inference of fact that the goods were supplied on the credit of the wife to the exclusion of the credit of the husband: *Bentley* v. *Griffin* (2); *Jewsbury* v. *Newbold*. (3) These last-mentioned matters, however proper for consideration in a suit against the husband, do not, I think, help much to solve the question in controversy in this appeal.

In my view the question here is not what Mrs. Holden in fact was, but how and in what character did she professedly contract. Prima facie every person who enters into a contract without disclosing that he or she has a principal contracts for himself or herself. The only facts indicating the nature of the defendant's position, or her power or authority to contract, known to the plaintiff company when the contract now sued upon was entered into which could in my opinion be regarded as evidence of any weight on the issues raised in this action are two: first the fact that the defendant when first introduced gave her name as Mrs. V. Holden or Mrs. E. Holden; and, secondly, the fact that subsequently she paid for wearing apparel supplied to her by cheques signed "May Holden." The opening of the account in the plaintiffs' books in the name of Mrs. Holden or Mrs. E. Holden, or the furnishing to her of bills in that name, are, as it has been said, "colourless transactions" not helping to a conclusion either way.

The two first-mentioned facts cannot, I think, be regarded as

(1) 5 Q. B. D. 394, at p. 402. (2) (1814) 5 Taunt. 356.
(3) (1857) 26 L. J. (Ex.) 247.

H. L. (E.) 1906 PAQUIN, LIMITED v. BEAUCLERK. Lord Atkinson.

amounting to a disclosure that the defendant had a principal, in this case her husband, or to a representation, express or implied, that she was contracting as agent on his behalf; and any finding of a jury that they amounted to either should necessarily, in my opinion, be set aside as having been made without evidence reasonably capable of supporting it. Nor do I think that these two facts amount to evidence from which a jury could legitimately draw the conclusion that the plaintiff company had constructive notice that the defendant was a married woman actually living with her husband and was prima facie contracting as his agent and pledging his credit.

I am therefore of opinion that Mrs. Holden must on the evidence be held to have contracted otherwise than as an agent. During the progress of the argument I entertained some doubt as to whether a new trial ought not to be directed; but on reconsideration I have come to the conclusion that there is no evidence on which a jury could legitimately find that she acted as agent for or on behalf of her husband. I accordingly think that the appeal should be allowed and that judgment should be entered for the appellants.

LORD LOREBURN L.C. My Lords, I find among the precedents the case of *Eastern Steamship Co. Ld.* v. *Smith* (1), on June 26, 1891, where the record is as follows: "It being moved to reverse the judgments or decrees complained of, the same was objected to, and inasmuch as the votes were equal, two for reversing and two for affirming, thereupon, according to the ancient rule of law 'Semper præsumitur pro negante,' the question for reversal was determined in the negative; therefore the judgment or decree complained of was affirmed and the appeal dismissed."

There is a note, which I believe is accurate, that costs are never given in such a case. I propose to your Lordships that that rule be adopted in this case, unless your Lordships think otherwise.

Order of the Court of Appeal affirmed, and appeal dismissed without costs.

Lords' Journals, March 26, 1906.

Solicitors: *Gery & Brooks; Lewis & Lewis.*

(1) [1891] A. C. 310, 316.

[PRIVY COUNCIL.]

BAUDAINS AND OTHERS . . . . . DEFENDANTS; J. C.*

AND 1905

RICHARDSON AND ANOTHER . . . . . PLAINTIFFS. *Nov.* 1, 2, 3, 7, 8.

ON APPEAL FROM THE ROYAL COURT OF JERSEY. 1906

Law of Jersey—Validity of Will—Undue Influence—Evidence of Executors inadmissible. *Feb.* 27,

In a suit by the heir-at-law of a testatrix against her executors and trustees and beneficiaries to set aside her will and codicil on the ground that at the date of execution thereof she was infirm of body, weak in mind, and under the undue influence of persons named :—

Held—(1.) that by the law and custom of Jersey the evidence of the executors was rightly excluded ;

(2.) That certain persons who were neither legatees nor trustees of her charitable trusts, but parochial authorities whose co-operation in administering them might be necessary, were wrongly added as parties, and were not on that account disqualified as witnesses ;

(3.) That, on the evidence, the testatrix was of sound mind, memory and understanding, and that there was no evidence of undue influence, since both will and codicil were shewn to have been the expression of the testatrix's own wishes, not induced by either fraud or coercion.

Boyse v. *Rossborough*, (1856) 6 H. L. C. 2, approved.

And, having regard to the jealousy with which evidence is excluded, a plaintiff should be held strictly to the case made by the pleadings and not allowed to pursue a charge of fraud for which no foundation is laid therein.

APPEAL from three judgments of the Royal Court of Jersey (Superior Number) dated in June and July, 1903, in which the validity of a will and codicil of Julia Westaway, dated respectively April 27, 1895, and August 31, 1898, was in question.

By the will the testatrix bequeathed to Elizabeth Mary Curwood, described therein as her housekeeper, a legacy of 1000*l.* and her carriage ; to Charles Curwood, brother of the said Elizabeth Mary Curwood, 100*l.* ; some further specific legacies ; and then to her executors and trustees 4000*l.*, to purchase or to erect a building to be used as a *crèche*, wherein

* *Present :* LORD MACNAGHTEN, LORD ROBERTSON, LORD LINDLEY, and SIR ARTHUR WILSON.

J. C. 1906 BAUDAINS v. RICHARDSON.

the children should be brought up in the best way possible under the direction and at the discretion of her said executors in accordance with the verbal instructions given by her to them, and afterwards under the direction of the future administrators; "such sum, not exceeding 2000*l.*, as shall be deemed necessary by my said executors shall be set aside, the interest of which shall be applied to the maintenance of this establishment."

After leaving some minor bequests of a specific character, and after giving a direction that her furniture was to remain in her residence, No. 1, St. Saviour's Crescent, which was to be so let for ten years, the will continued: "I will and order by these presents that the inherited realty which I have alienated, and to the replacing whereof my succession will be subject, shall be so replaced out of my personal estate by my said testamentary executors"; and, as to the remainder of her movable property, after replacing the said inherited realty and payment of legacies and debts, the same was bequeathed without any reserve to her testamentary executors, upon trust to invest the same in Jersey Rentes, and apply the income, as to one moiety each year to the shy poor (*pauvres honteux*) of the twelve parishes of the island at the discretion of the constable and the churchwardens of each parish, and, as to the other moiety, at the absolute discretion of the executors and trustees to the providing of clothes and boots and shoes for poor children of Protestant evangelical families obliged to attend the elementary schools of the island in virtue of the law on compulsory education.

By the codicil an annuity of 52*l.* for life was given to Charles Curwood, "in conformity with a certain undertaking" (*soussigné*), whereby the codicil stated that the deceased bound herself to pay the said sum to the said Charles Curwood.

The result of the first of the said three judgments was that seventy-two parochial authorities, six in each of the twelve parishes of Jersey, were retained as parties defendant to the action to set aside the will and codicil, since they alone could represent the *pauvres honteux* named as beneficiaries. The result of the second judgment was that these seventy-two persons, together with several others who were either interested in the suit or related to persons so interested, were not admissible

witnesses. The result of the third judgment was that both will and codicil were cancelled and annulled.

Sir E. Clarke, K.C., C. E. Jenkins, K.C., W. T. Barnard, K.C., and *C. V. Hawksford,* for the appellants, contended that it was contrary to law and to the interests of justice that a number of persons who were not legatees under the will should be retained as defendants, the only result of whose inclusion was their disqualification as witnesses. With regard to persons other than the parochial authorities whose evidence had been excluded, it was contended that they were not legatees, and were not disqualified by the law of Jersey; also that the evidence of the executors was admissible. They cited *Falle* v. *Godfray* (1); *Godfray* v. *Godfray* (2); *La Cloche* v. *La Cloche* (3); Terrien's Commentaires du droict Civil de Normandie, ed. 1578, p. 393, c. 34: De tesmoins. On the admissible evidence they contended that the testatrix's disposing capacity was proved, as also the absence of undue influence properly understood and defined.

Haldane, K.C., Durell (*S.-G. for Jersey*), and *H. D. Grazebrook,* for the respondents, contended that the excluded witnesses were inadmissible by the law and custom of Jersey. They referred to the authorities cited on the other side, and to Le Geyt, Commentaries on the Laws of Jersey, ed. 1847, vol. 3, p. 127. On the evidence both will and codicil were invalid, the testatrix having had no independent advice, her legal advisers themselves taking benefits thereunder, and the testatrix having been shewn to be under the dominating influence of Elizabeth Curwood to an extent which incapacitated her from forming an independent judgment. Reference was made to *Mitchell* v. *Thomas* (4); *Dufaur* v. *Croft* (5); *Barry* v. *Butlin.* (6)

Sir E. Clarke, K.C., replied.

1906
Feb. 27.

The reasons for the report were delivered by

LORD MACNAGHTEN. This was an appeal from three judgments of the Royal Court of Jersey (Superior Number). The substantial

(1) (1888) 14 App. Cas. 70.
(2) (1865) 3 Moo. P. C. (N.S.) 316, 327.
(3) (1870) L. R. 3 P. C. 125, 136.
(4) (1847) 6 Moo. P. C. 137, 149.
(5) (1840) 3 Moo. P. C. 136, 145.
(6) (1838) 2 Moo. P. C. 483.

J. C. 1906

BAUDAINS v. RICHARDSON.

question on the appeal was whether a document propounded as the will of Miss Julia Westaway, and purporting to deal with her personal estate, and a codicil thereto of trivial importance, were or were not valid testamentary instruments. Incidental to the main question, but arising out of separate judgments in the Royal Court, were two minor questions, one as to the joinder of parties, and the other as to the rejection of evidence. The three judgments are dated June 8 and 9 and July 11, 1903. The last is the principal judgment. It set aside and annulled both will and codicil.

Julia Westaway died on September 20, 1901, in her eighty-second year, leaving personal estate of the value of 90,000*l.* and upwards. The will which was impeached bears date April 27, 1895, that is, six years and a half before her death. The codicil is dated August 31, 1898.

Julia Westaway was the daughter of one Nathaniel Westaway, a builder in Jersey, who was in a very small way of business to start with, but a rich man when he died in 1852. He left three children—two daughters, Harriet and Julia, who lived together till Harriet's death in 1892, and a son whose name was John Nathaniel Westaway.

On the father's death there were quarrels over the division of his estate. The dispute became so violent, and the feeling in the family so bitter, that Mr. Westaway did not scruple to have his two sisters imprisoned in the public gaol in order to enforce a claim which he had established at law, but which they thought unjust. This he did on October 11, 1861. On November 1 following he went further. He reduced his sisters to "short commons." Bound by law to support them in prison, he refused to contribute to their maintenance more than the minimum allowance of 3*d.* a day. In less than a week Julia's health broke down. Then the sisters submitted to pay, and they were both released. But the entries in the prison books still remained, and indeed are yet extant, recording the incarceration of these two ladies and the scurvy treatment they received at a brother's hands. The indignity was never forgotten. Both the sisters were often heard to declare that Mr. John Nathaniel Westaway and his family should never have anything of theirs but what

might be claimed and exacted by law. The law of Jersey, it seems, allows the free disposition of personal estate, but does not permit alienation by will of descended real estate so long as there remains issue of the ancestor who brought the property into the family. The successor in his lifetime may alienate descended real estate, but then his own acquired real estate, or failing that his personal estate, becomes liable to make good the loss to the inheritance. Miss Westaway had real estate inherited from her father, some directly, some through her sister, and she had disposed of part by sale. To the extent of the proceeds of the sale and the property unsold she was aware that her brother's family had a legal claim upon her, but she was resolved—so she was in the habit of declaring—that no member of that family should ever get a penny more from her.

In pursuance of this resolve, or at any rate in accordance with Miss Westaway's declared intentions, the will of April 27, 1895, appears to have been made. It was little more than a repetition of an earlier will dated April 12, 1894. Substantially it gave in charity for the benefit of the poor the whole of her personal estate with the exception of the sum of 1000*l.*, which was bequeathed to Elizabeth Curwood.

Elizabeth Curwood was Miss Westaway's housekeeper, attendant, and companion. She entered Miss Westaway's service on July 15, 1893, and remained with her to the end. Among the actors in this drama Elizabeth Curwood is made to play the leading part. In the attack upon the will her position, her character, and her conduct formed the principal topics of discussion. Her influence was represented as the turning point on which the case depended. She was evidently a rough, coarse, vulgar, domineering woman, fond of boasting, and wholly devoid of education. She could not read or write, nor had she ever had any training as a nurse. She was addicted to drink, and occasionally, if not habitually, to the use of vile and abominable language. On the one hand she is represented as the real mistress of the house and of everything in it, including Miss Westaway herself. Miss Westaway, it is said, fell completely under her dominion, cowed into abject submission, a mere puppet to her will. That is the case for the attack. For the

J. C. 1906 BAUDAINS v. RICHARDSON.

defence it is maintained that Miss Westaway was alive to her servant's failings, but fully determined, of her own free will, in spite of remonstrances, to keep about her one who made her more comfortable than she had ever been in her whole life before. It does seem to be true that in many ways Elizabeth Curwood with all her faults was not such a bad servant for what Miss Westaway required. She was attentive to her mistress's wants. She kept her rooms clean and tidy, and always took care to supply her table with good food cooked to her liking, and with fruit and other delicacies of the season, and, as one witness said, "she could be gentle and not offensive." There were stories current of gross ill-treatment and barbarous cruelty on the part of Elizabeth Curwood towards her mistress. But, strange to say, the three doctors—Dr. Hind, Dr. Bentlif, and Dr. Bois—who attended Miss Westaway one after the other from the time Elizabeth Curwood entered her service, saw no trace or sign of ill-treatment or cruelty. Dr. Hind, a witness for the plaintiff, who was in attendance when she first came, thought Miss Westaway was not as carefully dressed or washed as he should have wished; but he attributed that to incompetence, not to cruelty. Elizabeth Curwood, he thought, "did her best." Such a case would be "a very severe tax on the nurse." "A certain amount of firmness was necessary." "It was a difficult case for a nurse to manage." Dr. Bentlif, also a witness for the plaintiff, who succeeded Dr. Hind, thought Miss Westaway was properly treated. He learned from her own lips that she would not hear of Miss Curwood leaving her. Miss Westaway had often expressed her satisfaction at the care which was taken of her by Miss Curwood. He believed that Miss Curwood followed to the best of her ability the directions he gave as medical adviser. He agreed with Dr. Hind in thinking that any shortcomings were due to nothing but incompetence. Miss Westaway never complained to him about cruelty. Both those gentlemen, it may be observed, owed their dismissal to Elizabeth Curwood, and certainly they were not prejudiced in her favour. Dr. Bentlif was actually turned out of the house by Elizabeth Curwood with insult and ignominy. Dr. Bois, who came last, attended Miss Westaway from the beginning of June till her death. He had

exceptional opportunities of observation; he lived nearly opposite. He visited his patient every other day in July and every day in August and September. Miss Curwood appeared to him to take proper care of Miss Westaway, except that she was sometimes coarse in her language and did not appear to realize her proper position; otherwise she took all necessary care of Miss Westaway, and she attended to all the directions he gave her. The different rooms which he saw were always clean and tidy. He never noticed anything to lead him to believe that Miss Westaway was ill-treated during the time he attended her. She never appeared to be in fear of Miss Curwood when he was present.

Elizabeth Curwood had a brother called Charles, who is described as an electrical engineer, a first-rate workman, but a man of intemperate habits. He was employed by Miss Westaway to do up her house in St. Saviour's Crescent, and to repair and decorate some other houses in the Crescent which belonged to her and had been unoccupied for a long time. He did the job to her entire satisfaction. She was proud of the result. His work was much admired. The houses, brought up to date with every modern convenience, readily found tenants. Miss Westaway considered that she was under great obligations to Charles Curwood, and allowed him to live in her house. She often praised his skill while regretting his outbreaks of intemperance. When he got drunk he generally quarrelled and fought with his sister, and then there were disgraceful scenes. His misdoings were public and notorious. On one occasion he smashed the front door with a heavy flower pot. He was so violent that he was given into custody, handcuffed, locked up, and brought before the magistrate. Miss Westaway had him prosecuted, but she appeared in court, interceded for him, and paid his fine. Probably his behaviour in Miss Westaway's house and his quarrels with his sister gave rise to much of the scandal and irrelevant gossip which is reproduced in the evidence on behalf of the plaintiff.

As regards Miss Westaway herself—reserving for the present, so far as possible, the question of testamentary capacity and the question of undue influence, the two grounds on which the will was impeached—there does not seem to be much room for

J. C. 1906 BAUDAINS v. RICHARDSON.

difference of opinion. She was a very commonplace, ordinary woman. She spoke both French and English—English by choice—but she had little education, and no culture or refinement. In conversation she was discursive, if not rambling. She seems to have been below the average in intellect—some thought her rather childish, others eccentric; she exacted or expected long visits from those of her acquaintances who called upon her, and, as one of the ladies who knew her best observes, "she was not a very interesting woman to speak to." She was inclined to be ostentatious, and, though she fancied she was looked down upon on account of her birth, she was not without a sense of her own importance. She was stubborn and obstinate and apt to stand on the defensive, or, to use a vulgar expression, to put her foot down, if she thought she was being pressed too far. For instance, a Wesleyan minister, presuming on past favours, suggested to her one day that it would be a kind thing to give one of her houses in the Crescent to the Methodist Church. He never crossed her threshold again. At the same time, she was extremely charitable. She was fond of children, very good to the poor, and liberal in bestowing her alms on any object that appealed to her compassion. She was impulsive and generous. She liked giving, but disliked being asked to give. In matters of business she was punctual and exact. With the help of Mr. Roger Eykyn, the stockbroker, who seems to have been a very old friend of hers, her money matters and investments were well managed. She made no secret of the way in which she intended to dispose of her wealth. Witness after witness came forward who had heard her declare that her relations would get nothing, and that all she had would go to the poor.

The persons to whom the administration of her estate in charity was entrusted were Mr. Baudains, Mr. Peter Falla, and Mr. Thelland, who were named as executors. They were all gentlemen of good position and high character. Mr. Baudains was an advocate of repute. He was constable of St. Hélier. He was an old friend of Miss Westaway, and she seems to have had a sincere regard and unbounded admiration for him. Mr. Falla was a solicitor of long standing, and had always

managed her business. Mr. Thelland, who is described as an accountant, had been at one time in Mr. Falla's office.

Assuming that Miss Westaway possessed testamentary capacity, and that her will was not procured by undue influence, the actual disposition which it was found to contain was apparently just what everybody expected. And, apart from some suggestions made in the course of the argument before this Board, which will be noticed presently, and apart from the charge put forward in the declaration in the action, no fault has been imputed to the gentlemen named as executors and trustees. Their competence and integrity are beyond suspicion. "They enjoy and deserve public confidence," says the rector of St. Saviour, by virtue of his office a member of the States or legislative assembly of the island.

The respondent John Westaway as principal heir sued the appellants, the executors and trustees, and the beneficiaries under the will and codicil, and claimed to have the same annulled on the ground that the same were made by the late Miss Westaway to the prejudice of the plaintiff and his co-heirs, and that at the time when Miss Westaway executed the said will and codicil she was infirm of body and weak in mind and under the undue influence of Elizabeth Curwood and Charles Curwood; that three of the appellants, namely, Messrs. Baudains, Falla, and Thelland, allowed the said Elizabeth Curwood and Charles Curwood to exercise the said undue influence, and that the said will and codicil were not the expression of the free will of the said Julia Westaway; and for other causes and reasons which called for the annulment of the said will and codicil.

The parties proceeded in the usual way to examine witnesses before a magistrate. The depositions were reduced to writing, and all questions arising on the evidence were referred to the Royal Court. The Court prefaced its ruling by declaring that, "By the law and custom of this island no person can be accepted as a witness in his own case, nor his heirs nor those who are partners in his quarrel, or near relatives, nor those who have similar quarrel, nor those who have prepared the case or defended it in Court or supported it or been counsel," adding that "local jurisprudence extends the exclusion at least to uncles

J. C. 1906 BAUDAINS v. RICHARDSON.

and nephews." In accordance with this ruling the Court excluded the evidence of the three executors and the evidence of a group of persons, including the rectors of the twelve parishes into which Jersey is divided, described generally as "parochial authorities," and their relatives. There can be no doubt that the evidence of the executors was properly excluded according to the law of the island. The ruling of the Court in their case is supported by the high authority of Terrien and Le Geyt, and is in conformity with the decisions of this Board in *La Cloche* v. *La Cloche* (1) and *Falle* v. *Godfray*. (2) The parochial authorities are in a different position. They are not legatees under the will or appointed trustees or visitors of the charity. The utmost that can be said is that if the will be held valid and the trust established, the co-operation of persons in their position would probably be useful if not necessary. It is difficult to see why they should have been made parties to the action except for the purpose of shutting their mouths and the mouths of their relatives. An application was made to have them dismissed. The Royal Court (Superior Number) thought that there would have been good ground for the application if it had been made at the earliest moment and before a preliminary judgment had been rendered on another question which apparently had precedence by accident. The slight delay, if there was anything that can be called delay, could not have prejudiced any party to the cause. Their Lordships think that the parochial authorities ought not to have been retained as parties, and consequently that their evidence and the evidence of their relations is admissible. Though it really adds nothing new to the evidence accepted by the Royal Court, it is very clear and very much to the point.

Having regard to the stage in the progress of a cause at which witnesses are summoned and examined in Jersey, and the jealousy of the law in excluding testimony from persons who may be supposed to have any connection with the parties to the controversy or any bias or leaning one way or the other, it is only fair and right that a plaintiff should be held strictly to the case made by the pleadings, and not allowed to shift his ground. In

(1) L. R. 3 P. C. 125. (2) 14 App. Cas. 70.

the present case the learned counsel for the respondents, while disclaiming any imputation on the honour of the executors, attacked the will on the ground that they took a beneficial interest under it, and that it was prepared by Mr. Baudains and Mr. Falla themselves. In their Lordships' opinion, in the special circumstances of this case, that does amount to a charge of fraud and dishonesty, for which no foundation is laid in the pleadings. The general words at the end of the declaration do not cover it. Their Lordships, therefore, had no hesitation in ruling that that line of argument was not permissible. But having heard and considered the whole of the evidence, except of course the evidence of the three executors, their Lordships think it right to say that in their opinion there is no justification for any imputation on the conduct of Messrs. Baudains, Falla, and Thelland. There are no suspicious circumstances in this case to bring in the wholesome rule laid down in *Barry* v. *Butlin* (1), and approved in *Fulton* v. *Andrew*. (2) The fact that by the law and custom of the island executors are entitled to receive remuneration for their services is not of itself a suspicious circumstance. There is nothing in the ingenious argument founded on the clause in the will which throws on the personalty the liability to make good the loss to the inheritance occasioned by the sale of descended real estate. The real estate devised to the executors by a will of even date was plainly not intended for their own use and benefit. It was given to them on a secret trust, as the Court seems to have held when it set aside that will, mainly on the ground of the existence of such a trust which is not allowed by the law and custom of the island.

It only remains to consider whether Julia Westaway possessed testamentary capacity, and whether the two instruments impeached in this case were the expression of her own will.

The medical evidence claims attention first.

The following questions and answers shew Dr. Bois's opinion :—

"3444. *Q.* In June, 1901, was Miss Westaway in your opinion capable of giving clear instructions to her lawyers for the preparation of her will, in other words, was Miss Westaway at that date capable of making a will?—*A.* She was."

(1) 2 Moo. P. C. 480. (2) (1875) L. R. 7 H. L. 448.

J. C. 1906 BAUDAINS v. RICHARDSON.

"3445. *Q.* Had Miss Julia Westaway asked you to witness a will of hers, say, in the month of June, 1901, would you as a medical man have hesitated to comply with her request?—*A.* I would not."

Dr. Bentlif, whose attendance began in July, 1897, in answer to a question as to the first twelve months of his attendance admitted that "she might have given instructions to her legal advisers." Then followed this question and answer:—

"703. *Q.* Am I to understand from your last answer that she was mentally capable of making a will or, as I have stated before, capable of giving intelligible instructions for the preparation of such will?—*A.* Yes, I think so."

Dr. Hind, who was in attendance at the time when the will was made, had stated at the trial about the will of realty that, if at that time he had known she had not made a will, he would have advised her to do so, provided that the will was made under the advice and with the help of Messrs. Baudains and Falla, or other such responsible lawyer, but would not have advised her to make a will trusting only to those about her. He admitted at the trial of the present case that that citation from his previous evidence was correct. Then he was asked: "558. *Q.* Are you still of the same opinion?" He answered, "Yes."

Besides the medical men who attended Miss Westaway regularly there was a Dr. Chappuis, who had been a tenant of hers up to the end of 1894, and had known her for seventeen years. He spoke in the highest terms of her business capacity, and said he had never known a woman who had a clearer mind on the subject of her affairs than she had at the end of 1894, and that he should not have hesitated for an instant to attest her will if she had asked him to do so. His connection with Miss Westaway came to an end abruptly, because he pressed her to do some repairs to his house, and she rejoined by giving him notice to quit.

Then there was a Dr. Gaffney, who was a medical man registered in the island, and had practised as an army surgeon from 1866 to 1894. He knew Miss Westaway up to the time of her death, and frequently visited her at her house in St. Saviour's Crescent. He considered her of sound mind during the years

1898 and 1899, and believed her mentally capable of making a will. He said that if Miss Westaway had asked him to attest her signature to a will in 1898 or 1899 he would not have hesitated to do so. He thought her a shrewd woman of business, but rather obstinate and disposed to have her own way.

Besides the evidence of the medical men, which is really all one way, there is the evidence of a large body of persons who testify to Miss Westaway's soundness of mind. There is the evidence of two solicitors, Mr. Piquet and Mr. Francis John Bois; two clergymen members of the States, Mr. Luce, rector of St. Saviour's, and Mr. Balleine, rector of the parish of St. Brelade; Mrs. Luce, wife of the rector of St. Saviour's; the Rev. Mr. Le Coat, pastor of the Evangelical Church in Brittany; Mrs. Le Coat; Mr. Lander, the artist; and several other persons whose position and standing make their testimony particularly valuable.

In October, 1897, Miss Westaway purchased from Mr. Lander for 400*l.* an oil painting called "Assise d'Héritage," and presented it to the States. It was accepted and now hangs in the Court house. Mr. Lander swears that Miss Westaway transacted the whole business of the purchase, and that Miss Curwood had nothing whatever to do with it. He saw a good deal of Miss Westaway and paid her visits of considerable length. Indeed, he thought himself lucky if he "got off in two hours." He was asked what was her mental condition. His answer was, "I never thought about it; she struck me as being quite normal." He thought her very sharp and shrewd in business.

Mrs. Luce's acquaintance with Miss Westaway began at the end of 1896 or the beginning of 1897. She frequently visited Miss Westaway, and conversed with her every time she saw her. She said that Miss Westaway was quite sane and rational in her conversation in 1897, 1898, and 1899, and that from personal knowledge she believed Miss Westaway to have been of sound mind, memory, and understanding when the will was made.

It would be tedious to go through the evidence of the other witnesses. It is all to the same effect. Some say that she was of sound mind; others say they never gave the question a thought; she was just like other people. And this evidence goes down to the date of her last illness.

J. C. 1906 BAUDAINS v. RICHARDSON.

The evidence of the witnesses for the plaintiff comes from a very different class of persons. With some few exceptions it consists of the testimony of discharged servants, or servants who had discharged themselves, and other persons who had fallen out with Elizabeth Curwood or whom Elizabeth Curwood had insulted or offended. Their evidence must be regarded with suspicion in a case where so much depends on the character of the witnesses. It is difficult to imagine that any decent or trustworthy person would think of entering Miss Westaway's service while the household was being managed by a woman so objectionable and so notorious as Elizabeth Curwood. The principal persons of a better class who are witnesses for the plaintiff are two Congregational ministers, the Rev. Mr. Skegg, and the Rev. Mr. Hagell, the superintendent of Dr. Barnardo's Home in Jersey, and a Mr. Whistler, a schoolmaster, describing himself as "an ardent amateur photographer," who frequently availed himself of Miss Westaway's kindness and took drives with her in her carriage to places of interest with his photographic apparatus. He thought Miss Westaway's mental powers during the years 1893, 1894, and 1895 were very feeble. Her talk was incoherent. It was very trying to listen to her. He thought Miss Curwood exercised a sort of hypnotic influence over Miss Westaway. He said he would not have attested Miss Westaway's will in April, 1895, if he had been requested to do so. He thought she was quite incapable of making any will at all. It seems impossible to place reliance on this gentleman's evidence, which is contradicted, not only by the overwhelming evidence on the part of the appellants, but by the admissions of the medical men called by the plaintiff himself.

The Rev. Mr. Skegg had also a very low opinion of Miss Westaway's mental qualities, though not quite so low as that which Mr. Whistler entertained. Miss Westaway was not a member of the denomination to which Mr. Skegg belonged, and never worshipped in his church, but he cultivated her acquaintance with relentless assiduity. From the date of Miss Harriet Westaway's death to the time when the acquaintance was broken off in 1895, he visited her apparently no less than eighty times, and there were occasions when he called and was not admitted.

He was so constant in his attendance that the Rev. Mr. Hagell was in the habit of calling him "Miss Westaway's chaplain." All went fairly well at first, but after a time, not perhaps unnaturally, Mr. Skegg grew very weary of Miss Westaway and Miss Westaway apparently grew very weary of Mr. Skegg. She "lost interest in the things which on" his "first acquaintance with her she was interested in." They were not congenial. But although Mr. Skegg thought so little of Miss Westaway's mental condition, he had no scruple in accepting from her between 300*l.* and 400*l.* for charitable objects in which he was interested. At last he tried to interfere with Miss Westaway's domestic arrangements, and he saw her no more.

The Rev. Mr. Hagell's evidence is much to the same effect as Mr. Skegg's, though he was not nearly so constant in his attendance. He thought Miss Westaway's conversation wearying and so incoherent that it seemed to exhibit childishness. But he accepted gifts and money from her for the home, and had no doubt that Miss Westaway was "mentally capable of making such gifts." His friendly relations with Miss Westaway terminated in August, 1894, owing to some misunderstanding about a bazaar.

The rest of the evidence on the part of the plaintiff is hardly worth noticing. For the most part it consists of gross and palpable exaggerations, mixed no doubt with some truth, in regard to Elizabeth Curwood's behaviour. As a sample of this kind of evidence, reference may be made to the incident of Charles Curwood's appearance in the police court which has already been mentioned. One witness, Cheney by name, was asked:—

"*Q.* Do you remember an occasion when Miss Westaway was called upon to go to the police court as a witness? What did Miss Curwood do or say on that occasion?—*A.* Yes, Miss Curwood used to teach her what to say."

Teacher and pupil alike are to be congratulated on the success of the performance. We have an account of what took place in the police court by a reporter on the staff of the *Evening Post*, a daily paper published in the island. The following question and answer occur in his evidence:—

"*Q.* When Miss Westaway gave her evidence before the

J. C. 1906 BAUDAINS v. RICHARDSON.

police court on September 8, 1898, did you notice anything unusual about the way in which she answered the judge's questions or anything which would have led you to suppose that she was not in the enjoyment of all her faculties?—*A.* The way she answered the judge's questions shewed that she thoroughly understood the case. In fact, she was cross-examined by the judge, but answered all his questions quite clearly. This fact struck me particularly, as I had heard when the case against Charles Curwood was coming on that to a large extent she was under the influence of Miss Curwood, but I found that all her answers were given in such a way as to prove the rumours I had heard to be without foundation."

The result of the voluminous evidence in this case satisfies their Lordships that at the date of the will of April, 1895, and at the date of the codicil of August, 1898, Miss Julia Westaway was of sound mind, memory, and understanding.

As regards undue influence, all that can be said is that undue influence is conspicuous by absence. Influence may be degrading and pernicious, and yet not undue influence in the eye of the law. The leading authority on the subject is the judgment of Cranworth L.C. in *Boyse* v. *Rossborough*. (1) It was the experience of Sir James Hannen that "there is no subject upon which there is a greater misapprehension." The misapprehension "arises," he says, "from the particular form of the expression." In his charge to a special jury in the case of *Wingrove* v. *Wingrove* (2), where those remarks occur, the learned President explains, very much as Lord Cranworth had explained, what is and what is not undue influence. He speaks of "influence" in its popular signification. He gives the instance of a young man caught in the toils of a designing woman or led astray by a profligate companion, with the result that under the influence by which he is surrounded he persuades himself to leave his property to his mistress or the man who has been his evil genius. However shocking the case may be, however cruel to his nearest relatives, that is not undue influence. "To be undue influence in the eye of the law," says the learned President, "there must

(1) 6 H. L. C. 2.

(2) (1885) 11 P. D. 81.

be—to sum it up in a word—coercion. It must not be a case in which a person has been induced by means such as I have suggested to you to come to a conclusion that he or she will make a will in a particular person's favour, because if the testator has only been persuaded or induced by considerations which you may condemn, really and truly to intend to give his property to another, though you may disapprove of the act, yet it is strictly legitimate in the sense of its being legal. It is only when the will of the person who becomes a testator is coerced into doing that which he or she does not desire to do that it is undue influence." Then his Lordship points out that there are different kinds of coercion, and concludes by saying that if the act is shewn to be the result of the wish and will of the testator at the time, then, however it is brought about—putting aside a case of fraud—still it is not undue influence. "There remains," his Lordship adds, "another general observation that I must make, and it is this, that it is not sufficient to establish that a person has the power unduly to overbear the will of the testator. It is necessary also to prove that in the particular case that power was exercised, and that it was by means of the exercise of that power that the will, such as it is, has been produced."

In the present case it is enough to say that there is not a scrap of trustworthy evidence to prove that Elizabeth Curwood or Charles Curwood exercised undue influence in the legal sense of the term over Miss Westaway, or coerced her into making either the will or the codicil. There is abundant evidence to shew that both the will and the codicil were the expression of Miss Westaway's own wishes.

Some reliance was placed on the gift in the will of 1895 and the earlier will of 1894 of 1000*l.* to Elizabeth Curwood, as being an extravagant gift which no woman in Miss Westaway's position, of sound mind, would think of making to a servant who had been for such a short time in her service. From what we know of Miss Westaway's character, it seems a very natural thing for her to have done. She was very rich and impulsively generous. She had no relations to care for, only herself and the poor. She had at last found an attendant and companion to suit her who made her comfortable—more comfortable than

J. C. 1906 BAUDAINS v. RICHARDSON.

she had ever been before—and no doubt she hoped to retain her services so long as she lived. On the other hand, it can hardly be doubted that if Elizabeth Curwood had at the date of the will of 1894 importuned Miss Westaway to make a bequest in her favour she would have been dismissed at once. If Elizabeth Curwood had sufficient power to coerce her mistress to make so large a bequest in her favour in 1894, it is certainly remarkable that she did not exercise the power attributed to her to obtain much larger bequests afterwards.

It is hardly necessary to refer to the charge against the executors of permitting Elizabeth Curwood and Charles Curwood to exercise undue influence over Miss Westaway. If it is intended as a charge of fraud and conspiracy against the executors, it is enough to say that there is not the slightest foundation for it. If it only means that the executors, or rather Mr. Baudains and Mr. Falla, did not try to induce Miss Westaway to get rid of her objectionable companion, it is not true in fact. Mr. Baudains did endeavour to persuade Miss Westaway to part with Elizabeth Curwood, but he failed just as others failed. And he knew better than anyone else how far he could properly and safely go in interfering in Miss Westaway's domestic arrangements. Mr. Hawksford, a solicitor called by the plaintiff, admitted that Mr. Baudains could not legally have done more than he did.

For these reasons, which out of respect to the Royal Court their Lordships have deemed it necessary to give in some detail, their Lordships thought it their duty, as they stated on December 15 last, humbly to advise His Majesty that the action ought to have been dismissed, and that the respondents ought to pay the general costs of the action and the appellants the costs occasioned by the evidence of the executors, and by the matters not proceeded with by the appellants. Their Lordships are of opinion that the costs should be on the higher scale, but that only two sets should be allowed to the defendants, viz., one set to the executors and the other to the remaining defendants collectively.

The respondents will pay the general costs of the appeal, but the appellants will pay a proper proportion, to be determined by

the registrar, in respect of the costs of the executors' evidence and of the matters not proceeded with by the appellants.

J. C.
1906
BAUDAINS
v.
RICHARDSON.

Solicitors for appellants: *Bennett & Ferris.*
Solicitors for respondents: *Williamson, Hill & Co.*

[PRIVY COUNCIL.]

DAME MARY MILLER, ÈS-NOM ET ÈS-QUALITÉ . PLAINTIFF;

AND

GRAND TRUNK RAILWAY COMPANY OF CANADA . . . . . } DEFENDANTS.

J. C.*
1905
Dec. 7, 8.
1906
Feb. 14.

ON APPEAL FROM THE SUPREME COURT OF CANADA.

Quebec Civil Code, Art. 1056—*Construction—Contract that Deceased shall have no Claim—"Satisfaction" means Real and Tangible Indemnity.*

The right of action conferred by art. 1056 of the Civil Code of Quebec on the widow and relatives of a deceased employee whose death has been caused by the fault of his employer is an independent and personal right, and not derived from the deceased or his representatives.

Robinson v. *Canadian Pacific Ry. Co.*, [1892] A. C. 481, followed.

Held, that the deceased could not be said to have "obtained satisfaction" from the respondent company within the meaning of that article unless he had obtained a real and tangible indemnity for the fault in question.

Where the deceased, as a condition of his employment, became a member of an insurance and provident society, a by-law of which provided that in consideration of the respondents' subscription thereto no member thereof or his representatives shall have any claim against the respondents for compensation on account of injury or death from accident; and it appeared from the society's provisions for sick allowance and insurance, that the respondents contributed only to the former, the latter being a scheme for mutual life insurance:—

Held, that assuming this by-law to be valid, the deceased had not obtained satisfaction within the meaning of art. 1056. The insurance money did not proceed from the respondents, had no relation to its offence, and was equally payable in case of natural death: *Reg.* v. *Grenier*, (1899) 30 Sup. Ct. Can. 42, overruled.

APPEAL granted by special leave from a decree of the Supreme Court (November 10, 1903) reversing a decree of the Court of

* *Present:* LORD MACNAGHTEN, LORD DAVEY, SIR FORD NORTH, and SIR ARTHUR WILSON.

J. C.
1906
DAME MARY MILLER v. CANADA GRAND TRUNK RAILWAY.

King's Bench for the Province of Quebec, and dismissing the appellant's action.

The appellant sued on behalf of herself and her four minor children, claiming $15,000 damages from the respondent company by reason of the death of her husband, Richard Ramsden, which was alleged to have been caused by the negligence of the respondents in several particulars stated.

The respondents denied the allegations of negligence, and alleged that the accident was caused by Ramsden himself through negligence and inattention to duty, and further pleaded that Ramsden was a member of the Grand Trunk Railway Insurance and Provident Society, and bound by all its rules, regulations, and by-laws, particularly by one by-law which declared that "in consideration of the subscription of the Grand Trunk Railway Company of Canada to the society, no member thereof or his representatives, shall have any claim against the company for compensation on account of injury or death from accident."

The verdict was for the plaintiff for damages $6000 to her, and $4000 to the children. The trial judge under art. 491 C. C. P. reserved the case for consideration by the Court of Review, which directed that judgment should be entered in accordance with the verdict. The Court considered that the jury's finding established a sufficient non-compliance with s. 243 of the Dominion Railway Act (51 Vict. c. 29) to render inoperative any agreement in regard to damages. They held that the by-law mentioned above was void and of no effect, and that the company could not by anticipation stipulate immunity from damages caused by its own neglect. It was also of opinion that such a by-law, even if binding upon the deceased, could not bind his widow, ascendants, or descendants, whose right of action is not a representative one, but an independent right accruing directly to them from the death of the person injured. Art. 1056 C. C., it was held, was not a re-enactment of Lord Campbell's Act. The Court of Appeal affirmed this judgment, but the Supreme Court of Canada (Girouard J. dissenting) reversed it. The majority were of opinion that s. 243 of the Railway Act did not apply; that the jury had not found negligence on the part of the company as distinguished from its

employees; that they were bound by the case of *Reg.* v. *Grenier* (1), which they held not to conflict with the case of *Robinson* v. *Canadian Pacific Ry. Co.* (2) They did not, however, express approval of the case of *Reg.* v. *Grenier* (1), while most of the judges in the Courts below had held that it conflicted with *Robinson's Case.* (2) Taschereau C.J. expressed doubts as to its correctness: "Here, were I unfettered by authority, I would be inclined to doubt if the deceased could be said to have received any indemnity or satisfaction, but I am bound by the authority of *Reg.* v. *Grenier* (1) to hold that he has."

R. C. Smith, K.C., for the appellant, contended that the verdict, which was unquestioned, clearly found that the death was due to the fault and negligence of the respondents. They were liable under s. 243 of the Dominion Railway Act (51 Vict. c. 29) for the damages awarded, and under the laws of the Province of Quebec it was contrary to public order to contract immunity from the consequences of negligence. With regard to the by-law of the Grand Trunk Insurance Society, it does not bind the appellant or her children, who never assented thereto, and the respondents can claim no benefit against them from the contract (if any) which resulted from the deceased being a member of it. Besides, the respondents had not contributed their proper proportion to the funds of the insurance society, and consequently there was no consideration for the alleged contract. Under art. 1056 of the Provincial Civil Code, the right of action given to the appellant and her children stands clear of all claims against the deceased. It is an independent right given by statute to them personally, and not as representing the deceased. He submitted that *Reg.* v. *Grenier* (1) should be overruled as inconsistent with *Robinson* v. *Canadian Pacific Ry. Co.* (2)

Lafleur, K.C., for the respondents, relied upon the indemnity or the satisfaction which the deceased had received during his lifetime. By reason of his membership of the insurance society, of its by-law and his undertaking to be bound by it, of the respondent's contribution to the society, the terms of the insurance certificate (which incorporated the by-law) accepted by the

(1) 30 Sup. Ct. Can. 42. (2) [1892] A. C. 481.

J. C.
1906
DAME MARY MILLER
v.
CANADA GRAND TRUNK RAILWAY.

deceased, there was a binding contract between him and the respondents that neither he nor his representatives shall be able to make the claim which is the subject of suit. Even if, as contended on the other side, the rights of the appellant and children as conferred by art. 1056 are independent in the sense contended for as not being derivative, still those independent rights are by the express terms of the article made dependent on the deceased not having received satisfaction. The respondents cannot, according to the true construction of that article, be made liable to render satisfaction twice over; and the deceased in his lifetime had received satisfaction within its meaning. There was nothing illegal in this agreement relied on, it was not prohibited by s. 243 of the Railway Act of 1888, and the acts of negligence found by the jury could validly be made the subject of a contract exonerating the respondents from liability.

Reference was made to Dominion Statutes of 1874, c. 65, s. 11; of 1878, c. 25, ss. 2 and 4: *Clements* v. *London and North Western Ry. Co.* (1); *Ferguson* v. *Grand Trunk Ry.* (2); Pothier on Obligations, ss. 7 et seq. and end of s. 71.

R. C. Smith, K.C., replied.

1906
Feb. 14.

The judgment of their Lordships was delivered by

LORD DAVEY. The appellant, Mary Miller, was the widow of Richard Ramsden, an employee in the service of the respondent company. On January 10, 1900, Ramsden was killed in a collision which took place between two trains on the respondent company's railway. The appellant has brought this action on her own account and as tutrix of Ramsden's minor children against the respondent company for damages occasioned to them by the accident. The action was tried by Doherty J., with the assistance of a jury, and by their verdict the jury found (amongst other things) that Ramsden's death was caused by the fault of the respondent company and its employees, and that Ramsden did not by his conduct contribute to bring about the said accident.

(1) [1894] 2 Q. B. 482.
(2) (1901) Quebec Rep. 20 Superior Court, 54, 66.

The jury assessed the damages suffered by the appellant personally at $6000 and those suffered by the children at $4000.

The learned judge, without entering judgment, reserved the case for the consideration of the Court of Review. That Court gave judgment in favour of the appellant, and their judgment was affirmed by the Court of King's Bench, but was subsequently reversed by the Supreme Court, from whose judgment the present appeal is brought.

Article 1056 of the Civil Code of Quebec contains the following provision:—

"In all cases where the person injured by the commission of an offence, or a quasi-offence, dies in consequence without having obtained indemnity or satisfaction, his consort and his ascendant and descendant relations have a right, but only within a year after his death, to recover from the person who committed the offence or quasi-offence, or his representatives, all damages occasioned by such death."

It has been decided by this Board in *Robinson* v. *Canadian Pacific Ry. Co.* (1) that the right of action of the widow and relatives under this article is an independent and personal right of action, and not, as in the English Act known as Lord Campbell's Act, conferred on the representatives of the deceased only. The right of action of the appellant is therefore prima facie clear, unless the deceased in his lifetime obtained indemnity or satisfaction for the negligence of the respondent company or its employees. Indemnity he had none, for neither he nor his representatives ever received, or became entitled to receive, anything on that account, but it is said that Ramsden "obtained satisfaction," and it is sought to shew that as follows.

Ramsden was at the time of his death a member of the Grand Trunk Railway Insurance and Provident Society, and indeed he was compelled to become a member of the society as a condition of his employment. By a by-law of the society (No. 15) it is provided that, "in consideration of the subscription of the Grand Trunk Railway Company to the society, no member thereof or his representatives shall have any claim against the company for compensation on account of injury or death from

(1) [1892] A. C. 481.

J. C. 1906

DAME MARY MILLER v. CANADA GRAND TRUNK RAILWAY.

accident." It cannot, of course, be maintained that Ramsden could by any act of his own release or discharge the independent right of action of his widow and children under art. 1056, but it is argued that he bartered away any right of action he himself might have had, and had accepted the subscription of the company to the funds of the society in accord and satisfaction of such right of action, and thus obtained satisfaction within the meaning of art. 1056. To this argument several answers have been made, but before discussing them it will be convenient to consider the constitution of the society and its rules and regulations.

The society was formed by the respondent company under the powers conferred by two Acts of the Parliament of Canada, 37 Vict. c. 65 and 41 Vict. c. 25. By the former Act the company was authorized to create a superannuation and provident fund, and by the latter Act (s. 2) the company was empowered to make either separately or in connection with the superannuation and provident fund provision for insurance against accidents to its employees which might include insurance against death, the payment of allowances during any period when they might be unable from accident or sickness to follow their ordinary calling, and the providing of suitable medical or surgical attendance, and (s. 3) the company was bound to contribute to such fund annually any amount not exceeding 150 per cent. of the amount which might be subscribed annually to such fund by the members thereof. The rules and regulations of the society, as amended, are, so far as material, to the following effect :—The objects of the society are defined to be (3.) to provide benefits or allowances to members when rendered incapable of following their usual, or any other suitable, employment in the company's service by illness or bodily injury. (4.) To provide, in case of the death of any member, a sum of money contributed by members of the society, and payable in accordance with rules 50 to 62. (12.) The affairs of the society are managed by a committee of management and local executive committee. (13.) The committee of management is composed partly of members nominated by the board of directors or the local executive committees, and partly of officers of the respondent company. (40 and 41 as amended)

Sick allowance is given at the rate of 50 cents per diem for the first six months, and 25 cents per diem for the second six months and thereafter, until the member is certified to be incurable or unfitted for his usual employment, when all further claims on the sick fund cease, but the member may continue his subscriptions to the insurance fund, or any member so certified may be permitted to commute his insurance for an immediate payment of one-fiftieth of the total amount insured for each completed year of membership. (50.) Insurance is divided into six classes. (57.) The amounts of insurance in each class, and the premium rate in each are defined. (58.) Upon the death of a member all the other members are to be assessed as many rates of the class in which insured as will in the aggregate produce as nearly as possible the amount for which the deceased member was insured, the balance over or under being carried forward to the next ensuing levy. In rule 66 it is stated that the respondent company will each half-year contribute out of the revenues of the company a sum in aid of the sick benefits and allowances of the society.

It will thus be seen that the provisions for "sick allowance" and "insurance" are quite distinct. The respondent company contributes only to the former and does not undertake to contribute to "insurance," as it was apparently contemplated by the Act that they would do. The sums payable on death or in commutation of insurance are to be raised exclusively by a levy on the other members. The scheme is, in fact, one for mutual life insurance.

The by-law in question (No. 15) which is relied on was made by the committee of management in exercise of a power contained in rule 19 "to make such by-laws as may from time to time be found necessary for the management of the affairs of the society." It was contended in the Courts below that the by-law was not a due exercise of the power, and was invalid. It was also contended that the by-law was invalid on the ground that the provincial law does not permit a person to contract himself out of responsibility for the consequences of his own wrong though he may so relieve himself from responsibility for the acts and defaults of his employees. And a question of some

J. C.
1906
DAME MARY MILLER v. CANADA GRAND TRUNK RAILWAY.

nicety was raised whether the verdict of the jury had found negligence on the part of the company itself. Both these points formed part of the grounds of decision by some at least of the learned judges who were in favour of the appellant. But these points were not discussed at the Bar on this appeal, and their Lordships are not called upon to express, and do not express or imply, any opinion upon either of them.

Assuming the by-law to be valid, is it, in the circumstances, an answer to the appellant's action? It is not sufficient to say that the possible right of action of the deceased has been extinguished, as was held in the case of *Robinson* v. *Canadian Pacific Ry. Co.* (1), where it had been lost by prescripton. And, as Lord Watson pointed out, the provision as to duelling in art. 1056 shews that cases were intended to be comprised in which there could be no right of action in the deceased. Their Lordships see no reason why the release or discharge by the deceased of his possible right of action should be held to be satisfaction within the meaning of art. 1056 of itself, or unless the deceased has thereby obtained from the offender something which is a real and tangible indemnity or satisfaction for the offence or quasi-offence in question. In this case Ramsden, of course, was not, and neither his representatives nor his widow nor his children were, entitled in consequence of the offence or quasi-offence of the company to a single dollar out of the sick fund. The insurance cannot be considered to be such indemnity or satisfaction—first, because the money payable in respect of it did not (according to the rules) proceed from the offender even in part; and, secondly, because the payment is independent of, and bears no relation to, the offence or quasi-offence, and would equally have to be made if the deceased had died a natural death. Their Lordships are aware that evidence was given that the respondent company does not recognize any division of the society and makes its contribution to the society to be used as it pleases. But this is not in accordance with the scheme contained in the rules, and for the present purpose their Lordships can only regard the rules as they stand.

Holding the views which have been expressed their Lordships

(1) [1892] A. C. 481.

do not find it necessary for them to discuss the question raised on s. 243 of the Dominion Railway Act, 1888.

Their Lordships are not sure that in coming to a conclusion in favour of the appellant they are differing from the real opinion of the learned judges in the Supreme Court. Chief Justice Taschereau said in the course of his judgment:—

"Here, were I unfettered by authority, I would be inclined to doubt if the deceased can be said to have received any indemnity or satisfaction, but I am bound by the authority of *Reg.* v. *Grenier* (1) to hold that he has."

And the other learned judges who delivered judgments in favour of the respondent company also hold themselves bound by that decision which they thought could only be distinguished if the company was itself in fault and not merely responsible for the fault of its employees. In *Reg.* v. *Grenier* (1) the judgment of the Court was delivered by Chief Justice Strong. The learned judge held that the action given by art. 1056 is merely an embodiment in the Civil Code of the action which had previously been given by a statute of Canada re-enacting Lord Campbell's Act, and that therefore the English decisions on that Act, such as *Griffiths* v. *Earl of Dudley* (2) were applicable to the case. He is reported to have said:—

"It must be acknowledged that if the deceased would, if he had survived, have had no claim for damages against the Crown, the suppliant can have none, provided we are right in assuming this to be a proceeding to be governed by the law applicable to actions under Lord Campbell's Act."

The assumption thus made was admitted by learned counsel to be erroneous, and their Lordships cannot attach any weight to a decision founded upon it.

Their Lordships will therefore humbly advise His Majesty that the judgment of the Supreme Court dated November 10, 1903, be reversed and the judgment of the Court of Review, dated March 31, 1902, and the judgment of the Court of King's Bench, dated November 20, 1902, be restored, and that the respondent company do pay to the appellant the costs of its appeal to the Supreme Court. As the appellant is appealing to His Majesty

(1) 30 Sup. Ct. Can. 42. (2) (1882) 9 Q. B. D. 357.

J. C. 1906

DAME MARY MILLER v. CANADA GRAND TRUNK RAILWAY.

in council in forma pauperis she will have only such costs of her appeal as are usual in such cases.

Solicitors for appellant: *Ingle, Holmes, Sons & Pott.*
Solicitors for respondents: *Batten, Profitt & Scott.*

[PRIVY COUNCIL.]

J. C.* 1905 *Dec.* 6, 7. 1906 *Feb.* 7.

MONTREAL AND ST. LAWRENCE LIGHT AND POWER COMPANY . . . . . PLAINTIFFS;

AND

ROBERT . . . . . DEFENDANT.

ON APPEAL FROM THE COURT OF KING'S BENCH FOR THE PROVINCE OF QUEBEC (APPEAL SIDE).

Quebec Act 1 *Edw.* 7, *c.* 67—*Construction—Powers of Company—Purchase—Effect of Resolution by an insufficient Quorum.*

Held, that under Quebec Act 1 Edw. 7, c. 67, the appellant company was empowered to acquire and hold for the purpose of its business real or immovable estate not exceeding a specified sum in yearly value in any part of the province except the judicial district of Quebec; and that, acting bona fide, it was the sole judge of what was required for that purpose.

Where a purchase intra vires of the above Act had been effected by the company under a resolution of the directors at a meeting on July 17, 1901, which authorized the completion thereof, subject to an option of reconveying within a specified time:—

Held, that after the lapse of the specified time the purchase was absolute, and that the company, which had furnished the vendor with a copy of the said resolution as one which had been duly and regularly passed, could not avoid it by shewing that it had been passed by an insufficient quorum.

APPEAL from a decree of the above Court (January 19, 1905), affirming a decree of the Superior Court in review, which had reversed a decree of Davidson J. (June 30, 1893) and dismissed the appellants' action.

The questions decided in appeal were whether the appellant company had power to purchase the property in question from

* *Present:* LORD MACNAGHTEN, LORD DAVEY, SIR FORD NORTH, and SIR ARTHUR WILSON.

the respondent under its charter and statutes; and whether there had been under the circumstances stated in their Lordships' judgment a valid and binding purchase.

The trial judge held that the company had power to purchase, but that the resolution of July 17, 1901, referred to in their Lordships' judgment did not authorize the terms of the deeds of sale, and that there was no subsequent ratification thereof. The Court of Review affirmed the finding that the purchase was intra vires, and held that the deeds of sale were authorized by the resolution and subsequently ratified. The Court of Appeal affirmed the judgment of the Court of Review.

Sir R. Reid, K.C., and *R. C. Smith, K.C.*, for the appellants, contended that under their charter and statutes they had no power to acquire the property in question. Those statutes were: Quebec, 51 & 52 Vict. c. 73; 59 Vict. c. 97; 61 Vict. c. 65; 1 Edw. 7, c. 67; Canadian, 53 Vict. c. 96. Under the preamble to the first of these statutes the company was, it was contended, clearly restricted in its operations to Chambly and the river Richelieu, and had no right to purchase property on the St. Lawrence river. The last Act (Canadian) was supplementary to the first, and is in terms clearly limited to the Richelieu river at Chambly. No authority was ever obtained to construct any works on the St. Lawrence river. The Act 61 Vict. c. 65, considered as a whole, led to the conclusion that it was not intended to extend the scope of the company's operations so as to enable to go anywhere through the province of Quebec. And the charter did not authorize the company to enclose Buisson Point or any other immovable property for the purpose of establishing independent works unconnected with the company's principal works at Chambly. It was also contended that 1 Edw. 7, c. 51, did not in any way enlarge the powers of the company. Further the resolution of July 17, 1901, did not authorize the deeds of sale or contemplate any absolute purchase. It only authorized the obtaining an option to purchase, and the deeds were never validly ratified: see arts. 1213 and 1214 of the Civil Code and art. 1727.

Macmaster, K.C., and *Lafleur, K.C.*, for the respondents,

J. C.
1906
MONTREAL AND ST. LAWRENCE LIGHT AND POWER COMPANY v. ROBERT.

contended that the judgments of the Court of Review and the Court of Appeal were right. The time for the exercise of the option to reconvey as stipulated in the deeds of July 18, 1901, was allowed to expire, and the option no longer existed. The effect of the deeds thereupon became absolute, and the title passed from the respondent to the company. The resolution of July 17, 1901, authorized the transaction, it was confirmed by a full meeting of directors on October 30 following, and there had been offer and acceptance as between the respondent and the company. There was also acquiescence in the transaction on the part of the company, and express ratification on December 4, 1901. Reference was made to art. 1727 of the Civil Code on mandate and ratification, corresponding with art. 1998 of the Code Napoléon, and to *Ex parte Badman*. (1) The purchase of Buisson Point was intra vires of the company. That question must be decided in reference to the Acts now in force, viz., 61 Vict. c. 65, as amended by 1 Edw. 7, c. 67, and the purchase in this case fell within the powers there described.

Sir R. Reid, K.C., replied.

1906
Feb. 7.

The judgment of their Lordships was delivered by

LORD MACNAGHTEN. By deed dated July 18, 1901, and made between the respondent, Edmund Arthur Robert, and the appellant, the Montreal and St. Lawrence Light and Power Company, Robert conveyed to the company a lot of land known as Buisson Point, situated at the Cascade Rapids on the river St. Lawrence, in the county of Beauharnois and province of Quebec, with the right of fishing in the river opposite and attached thereto. The consideration for the purchase, as stated on the face of the deed, was "one dollar, and other good and valuable consideration." The deed was prepared by, and executed in the presence of, Maître Perodeau, notary public, who was the company's notary. It bore the company's seal. It was signed by Mr. Porteous, the president, and Mr. Kitto, the secretary, of the company. Attached to it was a verified copy of a resolution purporting to have been passed at a meeting of the directors on the 17th of the same

(1) (1890) 45 Ch. D. 16.

month, and purporting to authorize the president and secretary "to complete the transaction and sign the necessary documents."

By another deed dated the same day, and made between the same parties, it was declared that the real consideration for the sale was the sum of $15,000 paid in cash, and an agreement to pay the further sum of $260,000 on the then next November 30. It was, however, declared that the purchaser should have the right at any time before November 30 to abandon the purchase by forfeiting the said sum of $15,000, and by reconveying the property to the vendor, in which case the sale was to be dissolved to all legal intents and purposes.

On January 4, 1902, the company brought an action against Robert praying for a declaration that the two deeds of July 18, 1901, were null and void, and asking that the registrar of the county of Beauharnois might be ordered to cancel all entries of the same in the registration books of the county, and that the vendor might be ordered and adjudged to repay the said sum of $15,000 to the company.

On January 7, 1902, Robert brought an action against the company seeking to recover $260,000, as the balance of the purchase-money alleged to be overdue.

The two actions were consolidated, and came on to be heard on June 30, 1903, before Davidson J. The learned judge maintained the action of the company except so far as it asked for repayment of the $15,000, and dismissed the action of the respondent Robert. The Superior Court, sitting in review, reversed the judgment of the trial judge and dismissed the company's action. Their decision was affirmed by the Court of King's Bench for the province of Quebec. From the judgment of that Court the present appeal has been brought.

The argument on the appeal before this Board resolved itself into two questions :

(1.) Had the company power to buy Buisson Point ?

(2.) Did the company, in fact, buy it ?

The company was incorporated in 1888 by a Quebec statute, 51 & 52 Vict. c. 73, under the name of the Chambly Manufacturing Company, for the purpose of creating water power on the river Richelieu near Chambly, and carrying on business

J. C.
1906
MONTREAL AND ST. LAWRENCE LIGHT AND POWER COMPANY v. ROBERT.

there as an electrical lighting and power company. That Act, and a subsequent Act passed in 1895, were replaced by a Quebec statute passed in 1898, 61 Vict. c. 65. By it the company was reincorporated under its original name, and its powers were increased. In 1901, by another Quebec statute, 1 Edw. 7, c. 67, assented to on March 28, 1901, the corporate name of the company was changed to the name of the Montreal and St. Lawrence Light and Power Company, and its powers were again increased.

The provisions of the Act of 1898 were discussed at considerable length. On the one hand, it was argued that by that Act the company was empowered to set up works on any river in the province of Quebec except that part of the province which forms the judicial district of Quebec. On the other hand, it was contended that, notwithstanding the generality of the language of the Act, the company was still restricted to the use of the river Richelieu and its tributaries, and that its operations must be confined within certain prescribed limits, which do not include or extend to Buisson Point. In the opinion of their Lordships, it is not necessary to pronounce a decision on the construction of the Act of 1898. In view of the provisions of the Act of 1901, under which the company seems to have been absorbed or acquired (as its president prefers to say) by another company known as the Montreal Light, Heat, and Power Company, it would serve no useful purpose to do so. Whatever may be the sphere of the company's operations as described in the Act of 1898, it is clear that the company was empowered to acquire and hold, for the purpose of its business, real or immovable estate not exceeding a specified sum in yearly value in any part of the province outside the prohibited district. The company acting bona fide must be the sole judge of what is required for the purpose of its business. It appears, therefore, to their Lordships that the transaction in itself was not ultra vires, and consequently the first question must be answered in the affirmative.

As regards the second question — the question whether the company did in fact buy, or bind itself to buy, the property — the real difficulty is to ascertain the gist and substance of the

company's complaint. There is no suspicion of fraud or circumvention or surprise or collusion. It is not suggested that Robert took advantage of the innocence or inexperience of those with whom he was dealing. They were "all," as James Ross, the vice-president of the Montreal Light, Heat, and Power Company, said, "first-class business men, and associated with him in many enterprises." It is not suggested that Porteous, the president of the appellant company, or the secretary, or the notary betrayed the interests of the company confided to them. There is no entry in the minutes disavowing the action of the president or censuring him for exceeding his instructions. The case presented by the learned counsel for the company in his opening address was that the notion of buying was not in the mind of the directors at all. They wanted—or James Ross, who, though not a director, had a controlling interest in the company and in other companies of the same class, and was the prime mover in the matter, wanted —an option, an option pure and simple, that would lapse of itself if nothing was done. That was the real meaning, it was said, of the resolution of July 17, 1901. But somehow, without any fault on the part of anybody in particular, the company found itself committed to a purchase. Now, the facts of the case, when examined, tell a very different story. It is quite true that at first the negotiation was for an option. It seems that a tender for the lighting of the city of Montreal was then in the market, and Ross and his associates thought that the water power at Buisson Point was, at any rate, worth securing. They had obtained the offer of an option from Robert, the owner of Buisson Point. Robert saw his opportunity, and, after a week's delay on the part of Ross, pressed for an immediate reply. On July 11 he wrote, "I shall consider myself free unless I hear from you to-day." There was no reply, or no satisfactory reply, to this communication. Then he made a definite offer in writing to sell the property to Ross or his nominee on certain terms which gave an option to the purchaser of abandoning the purchase within a fixed time on forfeiting the deposit. On the same day, July 11, 1901, in the absence of Ross, Porteous, who held a power of attorney from Ross, and was, as Ross said, his

J. C. 1906 MONTREAL AND ST. LAWRENCE LIGHT AND POWER COMPANY v. ROBERT.

"trusted ally," accepted the offer in Ross' name, and declared his nominee to be "the Montreal and Saint Lawrence Light and Power Company." Then came the directors' meeting of July 17. The minutes of that meeting were entered by Porteous himself. The preamble to the resolution certainly contains the word "option." "The purchase," it says, "was to be in the shape of an option up to November 30, 1901, for the sum of $275,000, of which $15,000 is to be paid in cash on the passing of the deed to the company." The resolution is, "That the president and secretary be authorized to complete the transaction and sign the necessary documents." If the minutes are read with any attention it becomes quite plain that what was meant was not a mere option, but an actual conveyance with the option of reconveyance within a specified time. So the company's notary must have understood it. In order to prepare the conveyance he must have had before him Robert's offer of July 11, and Porteous' acceptance of it, as well as the resolution of July 17. It was his duty "to complete the transaction," so far as the legal part of the business was concerned, and prepare "the necessary documents," and no fault can be found with what he did. The deed was passed and the deposit of $15,000 duly paid by the company.

There is no satisfactory explanation why the directors allowed November 30 to slip by without making any move. The directors may have thought that Ross had assumed the management of their affairs. Ross may have supposed that the directors were then looking after their own business. Porteous may have forgotten the terms of the bargain, or he may have judged it inexpedient to throw the bargain up at that particular moment. Whatever the cause was, Robert was not to blame. His conduct seems to have been quite straightforward and above board. It was no fault of his if the directors of the company were careless or supine.

Another point was made on behalf of the company. It seems to have been a mere afterthought, for there is no hint of it before the action was launched. It is said that the meeting of July 17 was irregular: there was not a quorum present; therefore the resolution passed on that occasion was invalid and goes for

nothing. It is quite true that the by-laws require the presence of three directors to make a quorum—and only two attended on the 17th. But, after all, the by-laws of a company constituted as the Montreal and St. Lawrence Light and Power Company was constituted are not public property. They concern matters of internal management. Those who deal with the company have no means of access to them, no right to pry into the company's archives or interrogate its officials. There was nothing to put Robert on inquiry. The officials of the company, the president, the secretary, and the notary furnished him with a copy of a resolution which purported to be a resolution of the directors duly and regularly passed. On the faith of that representation Robert altered his position and parted with his property. The company cannot now be heard to say to the vendor: "You should not have given credit to what our people told you." If such a plea were listened to, no one would be safe in dealing with a company having private regulations of its own inaccessible to the outside world to which appeal could be made, in case of need, to relieve it from solemn obligations or save it from a bad bargain.

Such being their Lordships' view it would seem to be a work of supererogation to inquire whether the resolution of July 17, if invalid, has been validated by subsequent resolutions or by the subsequent conduct of the company.

On the whole their Lordships agree with the Superior Court sitting in review and the Court of King's Bench, and they will humbly advise His Majesty that the appeal should be dismissed.

The appellant will pay the costs of the appeal.

Solicitors for appellants: *Blake & Redden.*
Solicitors for respondent: *Lawrence Jones & Co.*

[PRIVY COUNCIL.]

J. C. 1905 *Dec.* 13, 14, 15. 1906 *Feb.* 27.

ATTORNEY-GENERAL FOR BRITISH COLUMBIA . . . . . } Plaintiff;

AND

CANADIAN PACIFIC RAILWAY COMPANY . Defendants.

ON APPEAL FROM THE SUPREME COURT OF BRITISH COLUMBIA.

British North America Act, 1867, *ss.* 91, 92, 108—*Power of the Dominion to legislate for Provincial Crown Property—Dominion Act* (44 *Vict. c.* 1), *s.* 18 (*a*)—*Provincial Foreshore.*

Sect. 108 of the British North America Act, 1867, empowers the Dominion Parliament to legislate for any land, including foreshore, which is proved to form part of a public harbour. Sects. 91 and 92, read together, empower the Dominion to dispose of provincial Crown lands, and therefore of a provincial foreshore, for the purposes of the respondent railway, which is a trans-continental railway connecting several provinces:—

Held, that s. 18 (*a*) of the respondents' incorporating Dominion Act (44 Vict. c. 1) is not controlled by the Consolidated Railway Act, 1879, and applies to provincial as well as Dominion Crown lands. Power given thereunder to appropriate the foreshore in question includes a power to obstruct any rights of passage previously existing across it.

Appeal from a judgment (April 15, 1905) of the Full Court, affirming a judgment of Duff J. (July 30, 1904), which dismissed the appellants' suit, with costs to be paid by the relator, the city of Vancouver.

The action was for a declaration (with appropriate relief) that the public have a right of access to the sea via Cambie Abbott and Carral Streets in the city of Vancouver, notwithstanding that the foreshore at the ends of those streets is occupied by wharves, yards, line of railway, &c., built by the respondent company. The respondents justified the construction of their works under powers conferred upon them by the Parliament of Canada, and the question decided in the appeal was whether that

* *Present:* Lord Macnaghten, Lord Davey, Sir Ford North, and Sir Arthur Wilson.

Parliament had jurisdiction to grant such powers under the circumstances stated in their Lordships' judgment.

The Dominion Government had issued a Crown grant to the respondents of lands required by them under s. 18 (*a*) of their incorporating Act (44 Vict. c. 1, Canada), including all the foreshore at the street ends above mentioned and a portion of the bed of the harbour below low-water mark. The trial judge found that the company's works thereon, which constituted the obstruction complained of, were necessary to meet the reasonable requirements of the company. He held that the property in the harbour including the lands in question passed to the Dominion under s. 108 of the British North America Act 1867; that the company's Act of incorporation authorized the construction and user of the works for the purposes of the railway; and that as such user required the exclusive occupation of the locus in which they were placed the public rights referred to, if not extinguished, were suspended during the period of user for such purposes.

On appeal, the Full Court affirmed this judgment, and further held that in any event the Dominion Parliament had legislative jurisdiction, when legislating in respect to Dominion railways, over provincial lands and the rights of the public over streets, and therefore had power to pass s. 18 (*a*) above referred to, even if the foreshore and lands under the sea taken under that section were owned by the province. If this were not so in the case of ordinary Dominion railways, it would be so in the case of the railway built by the respondent company, which was built as a fulfilment by the Dominion Government of its obligations under the 11th clause of the terms of union between British Columbia and Canada.

C. Wilson (Attorney-General of British Columbia), *C. A. Russell, K.C.*, and *Simon*, for the appellant, contended that it was not within the jurisdiction of the Dominion Parliament to authorize the appropriation of the said streets, street ends, and foreshore for the purposes of the railway in question. The powers purporting to have been conferred on the respondents are to be found in ss. 17 and 18 of the charter of incorporation scheduled to a

J. C. 1906

ATTORNEY-GENERAL FOR BRITISH COLUMBIA v. CANADIAN PACIFIC RAILWAY.

contract which is appended to and approved and ratified by the incorporating Act (44 Vict. c. 1): see also 50 Vict. (Canada) c. 56, s. 5. They render applicable the provisions of the Dominion Consolidated Railway Act, 1879 (42 Vict. c. 9), with certain modifications, and s. 15 of that Act did not justify what has been done in this case. Moreover, s. 18 (*a*) of 44 Vict. c. 1 on its true construction did not apply to provincial Crown lands, but was limited exclusively to Dominion Crown property. Upon the question of the legislative authority of the Dominion to authorize the appropriation in question, reference was made to the British North America Act, 1867, s. 108 and ss. 91 and 92, and it was contended that these provisions should not be so construed as to authorize the appropriation of provincial Crown lands. Reference was made to *North Shore Ry. Co.* v. *Pion* (1); *Attorney-General for Canada* v. *Attorneys-General for Ontario, &c.* (2); *Canadian Pacific Ry. Co.* v. *Corporation of the Parish of Notre Dame de Bonsecours* (3); *Ontario Mining Co.* v. *Seybold* (4); *Toronto Corporation* v. *Bell Telephone Co. of Canada.* (5)

Sir R. Finlay, K.C., E. P. Davis, K.C., and *Rowlatt,* for the respondents, contended that the construction of the works in question was authorized by 44 Vict. c. 1, and the location thereof was confirmed and ratified by 50 Vict. c. 56. The foreshore was part of a public harbour both at the date of the incorporating Act and of the admission of British Columbia into the Dominion; and the property and legislative jurisdiction over it was in the Dominion. By the 11th clause of the terms of union the Canadian Government undertook to secure the completion of a trans-continental railway running from the Atlantic to the Pacific. Under ss. 91 and 108 of the British North America Act the Dominion had power to extinguish any public rights over the foreshore or bed of a public harbour. And it had power to authorize the works in question by virtue of its general power to legislate in respect of Dominion railways: (see s. 91, sub.-ss. 1, 10, 29, s. 92, sub.-s. 10) and in particular by virtue of the Imperial Order in Council of May 16, 1871,

(1) (1889) 14 App. Cas. 612.
(2) [1898] A. C. 700, 711, 712.
(3) [1899] A. C. 367.
(4) [1903] A. C. 73, 79.
(5) [1905] A. C. 52.

passed under s. 146 of the Act of 1867, and providing for the construction of a trans-continental railway. Reference was made to *Attorney-General for Canada* v. *Attorneys-General for Ontario, &c.* (1), as to public harbours. See also *Corporation of Yarmouth* v. *Simmons.* (2)

Wilson, K.C., replied.

The judgment of their Lordships was delivered by

SIR ARTHUR WILSON. This is an appeal from a judgment, dated April 15, 1905, of the Full Court of the Supreme Court of British Columbia, which affirmed a previous judgment of a single judge of the same Court.

The suit out of which the appeal arises is of the nature of an information by the Attorney-General of British Columbia, on the relation of the city of Vancouver, against the Canadian Pacific Railway Company. The statement of claim alleged that the public was entitled to certain rights of way over the foreshore of the sea in the city of Vancouver, and that the defendants had so constructed their railway and works upon the foreshore as to obstruct those public rights of way; and it asked for a declaration of the rights of the public and for consequential relief.

The defendant company denied the existence of the alleged public rights of way. They justified what they had done by virtue of their statutory powers; and they raised another defence based upon a by-law of the city of Vancouver. This last defence their Lordships think it unnecessary to notice further.

The facts necessary for the decision of the present case may be very briefly stated.

In 1871 British Columbia entered the Canadian Confederation, the construction of an inter-colonial railway being one of the terms of the union. The present railway company was incorporated in 1881 by the Canadian Pacific Railway Act of the Dominion Parliament (44 Vict. c. 1) for the purpose of constructing and working the inter-colonial railway whose name is embodied in the title to the Act. The railway was first constructed as far as Port Moody, but was afterwards extended

(1) [1898] A. C. 711. (2) (1878) 10 Ch. D. 518, 526.

J. C.
1906
ATTORNEY-GENERAL FOR BRITISH COLUMBIA v. CANADIAN PACIFIC RAILWAY.

some miles further west to the city of Vancouver. The arrangement for this extension appears to have been entered into in 1885.

The city of Vancouver lies along the southern bank of an inlet of the sea known as Burrard's Inlet. It was incorporated as a city in 1886; but some years before that date, apparently in 1870, a portion of what is now the city was laid out (on paper at all events) as the old Granville Townsite. The plans of that townsite, or intended site, shewed blocks of land above, on, and below the foreshore. They shewed three streets, Carral Street, Abbott Street, and Cambie Street, parallel to one another running from south to north, that is to say, from the landward to the coast line. The alleged public rights of way the interruption of which is now complained of were in continuation of those streets, across the foreshore down to low-water mark.

The learned judge who tried the case found that the rights of way contended for did exist both at the time when British Columbia joined the Confederation and at the time when the railway company by the construction of its works interrupted the free access to the sea. The learned judges of the Full Court did not dissent from this finding, rightly addressing their minds to the more important general questions arising in the case. Their Lordships propose to follow a similar course. Grave difficulties were pointed out in the course of the argument in the way of upholding the validity of the rights of way. But as the appeal can be disposed of upon broader grounds their Lordships do not think it necessary to enter upon this minor inquiry; and they assume for the purpose of this judgment that the public rights of way existed as found.

That those rights of way have been interrupted is not open to question, for the railway and its adjuncts have been carried along the coast both above and below low-water mark. Prior to the time when British Columbia entered the Confederation in 1871, the foreshore in question was Crown property of the Colony, now the Province, of British Columbia.

The railway company justifies what it has done under s. 18 (*a*) of the Act of the Dominion Parliament which incorporated it (44 Vict. c. 1), which says:—

"The company shall have the right to take, use, and hold the

beach and land below high-water mark in any stream, lake, navigable water, gulf or sea in so far as the same shall be vested in the Crown and shall not be required by the Crown, to such extent as shall be required by the company for its railway and other works, and as shall be exhibited by a map or plan thereof deposited in the office of the Minister of Railways."

The map or plan required by the last words of the section was duly deposited.

The right of the Dominion Parliament so to legislate with respect to provincial Crown lands situated as these are was based in argument upon two distinct grounds.

The first ground was this: Sect. 108, with the Third Schedule of the British North America Act, 1867 (Imperial Act 30 & 31 Vict. c. 3), includes public harbours amongst the property in each province which is to be the property of Canada. This certainly empowers the Dominion Parliament to legislate for any land which forms part of a public harbour.

In a case heard by this Board, *Attorney-General for the Dominion of Canada* v. *Attorneys-General for Ontario, Quebec, and Nova Scotia* (1), it was laid down that—

"It does not follow that, because the foreshore on the margin of a harbour is Crown property, it necessarily forms part of the harbour. It may or may not do so, according to circumstances. If, for example, it had actually been used for harbour purposes, such as anchoring ships or landing goods, it would, no doubt, form part of the harbour; but there are other cases in which, in their Lordships' opinion, it is equally clear that it did not form part of it."

In accordance with that ruling the question whether the foreshore at the place in question formed part of the harbour was in the present case tried as a question of fact, and evidence was given bearing upon it directed to shew that before 1871, when British Columbia joined the Dominion, the foreshore at the point to which the action relates was used for harbour purposes, such as the landing of goods and the like. That evidence was somewhat scanty, but it was perhaps as good as could reasonably be expected with respect to a time so far back, and a time when

(1) [1898] A. C. 700, at p. 712.

J. C. 1906 — ATTORNEY-GENERAL FOR BRITISH COLUMBIA v. CANADIAN PACIFIC RAILWAY.

the harbour was in so early a stage of its commercial development. The evidence satisfied the learned trial judge, and the Full Court agreed with him. Their Lordships see no reason to dissent from the conclusion thus arrived at. And on this ground, if there were no other, the power of the Dominion Parliament to legislate for this foreshore would be clearly established.

The second contention in support of the right of the Dominion Parliament to legislate for the foreshore in question is rested upon s. 91, read with s. 92, of the British North America Act, which secures to the Dominion Parliament exclusive legislative authority in respect of lines of steam or other ships, railways, canals, telegraphs, and other works and undertakings connecting any province with any other or others of the provinces, or extending beyond the limits of the province, a description which clearly applies to the Canadian Pacific Railway.

It was argued for the appellant that these enactments ought not to be so construed as to enable the Dominion Parliament to dispose of provincial Crown lands for the purposes mentioned. But their Lordships cannot concur in that argument. In *Canadian Pacific Ry. Co.* v. *Corporation of the Parish of Notre Dame de Bonsecours* (1) (a case relating to the same company as the present) the right to legislate for the railway in all the provinces through which it passes was fully recognized. In *Toronto Corporation* v. *Bell Telephone Co. of Canada* (2), which related to a telephone company whose operations were not limited to one province, and which depended on the same sections, this Board gave full effect to legislation of the Dominion Parliament over the streets of Toronto which are vested in the city corporation. To construe the sections now in such a manner as o exclude the power of Parliament over provincial Crown lands would, in their Lordships' opinion, be inconsistent with the terms of the sections which they have to construe, with the whole scope and purpose of the legislation, and with the principle acted upon in the previous decisions of this Board. Their Lordships think, therefore, that the Dominion Parliament had full power,

(1) [1899] A. C. 367. (2) [1905] A. C. 52.

if it thought fit, to authorize the use of provincial Crown lands by the company for the purposes of this railway.

It was contended, however, for the appellant that, assuming the competence of the Dominion Parliament to legislate with respect to provincial Crown lands, such as those now in question, it has not in fact done so, for it was said that s. 18 (*a*) of the Canadian Pacific Railway Act, when it authorized the company to take the foreshore of the sea "in so far as the same shall be vested in the Crown," should be construed as limited to Dominion Crown property. The argument was rested mainly upon the words in the same section "in so far as the same shall not be required by the Crown," and upon the words at the end of the section requiring the deposit of a map or plan in the office of the Minister of Railways.

It was argued that no protection is here provided for provincial interests and that therefore the section should not be held to apply to provincial lands. But with regard to the exception of lands required by the Crown, their Lordships think that they apply to provincial requirements no less than to those of the Dominion. The final words of the section are mere matters of procedure; and in prescribing the procedure the Legislature must be taken to have assumed that all necessary communications between the Dominion Governments and the provincial Governments would always take place. This argument therefore fails, in their Lordships' opinion.

It was next contended that s. 18 (*a*) of the Canadian Pacific Railway Act, assuming it to apply to such provincial Crown lands as those in question, did not authorize the closing of public highways.

It was pointed out that that Act incorporated the Consolidated Railway Act, 1879, in so far as its provisions were not inconsistent with, or contrary to the provisions of, the incorporating Act, and that s. 15 of the Consolidated Railway Act contains a variety of provisions relating to the interference with highways by railway companies which, if applicable, would be inconsistent, it is said, with what the respondent company has done. It is unnecessary to inquire whether the provisions referred to would or would not apply to such rights of way as those now in question.

J. C. 1906 — ATTORNEY-GENERAL FOR BRITISH COLUMBIA v. CANADIAN PACIFIC RAILWAY.

It is enough to say that the language of the Canadian Pacific Railway Act must prevail over that of the Consolidated Railway Act which applies only so far as it is not inconsistent with the special Act. And it is clear, in their Lordships' opinion, that the power given to the company to appropriate the foreshore for the purposes of their railway of necessity includes the right to obstruct any rights of passage previously existing across that foreshore.

Their Lordships will humbly advise His Majesty that this appeal should be dismissed. The appellant will pay the costs.

Solicitors for appellant: *Gard, Rook & Winterbotham.*
Solicitors for respondent company: *Blake & Redden.*

[PRIVY COUNCIL.]

J. C.* 1905 — *July* 13, 14, 20; *Dec.* 18.

HEMCHAND DEVCHAND . . . . . PLAINTIFF;

AND

AZAM SAKARLAL CHHOTAMLAL . . . . DEFENDANT.

FROM THE COURT OF THE AGENT TO THE GOVERNOR, KATHIAWAR, BOMBAY PRESIDENCY.

AND

TALUKA OF KOTDA-SANGANI . . . . . PLAINTIFF;

AND

STATE OF GONDAL . . . . . DEFENDANT.

FROM THE GOVERNOR OF BOMBAY IN COUNCIL.

Right of Appeal to the King in Council—Appellate Orders of the Governor of Bombay in Council—Decrees of Courts of Political Agents in Kathiawar—British Political Tribunals in a Foreign State—Courts established by the Executive for Political Purposes—Suits to enforce and redeem a Mortgage.

The intention of the British Government is and always has been that the jurisdiction exercised in connection with the province of Kathiawar should be political and not judicial in its character; the ultimate appeal being to the Secretary of State for India in Council. Kathiawar is not as a whole within the King's dominions. It has been controlled by the British Indian Government for a very long period in different degrees

* *Present:* THE LORD CHANCELLOR (Earl of Halsbury), LORD MACNAGHTEN, LORD DAVEY, LORD JAMES OF HEREFORD, LORD ROBERTSON, and SIR ARTHUR WILSON.

in its various component States, but has never been treated as British territory or as subject to the laws in force in the Bombay Presidency or enacted by the British Indian Legislature. Nor has there been any authoritative assertion of territorial sovereignty therein. A system of judicial administration has been established therein, not by legislation, but by orders of the Executive Government, the judicial officers being Assistant Political Agents, with an appeal to Political Agents to deal with cases both political and civil. In the former cases their functions are "diplomatic and controlling," deciding as they "think proper"; in both the intention of the Government is and has been that the jurisdiction exercised should be guided by policy rather than by strict law:—

Held accordingly in two suits, one classed as civil to enforce a mortgage, and the other classed as political to redeem a mortgage, brought in the Courts of Assistant Political Agents in Kathiawar, that an appeal does not lie from appellate orders therein passed by the Governor of Bombay in Council to His Majesty in Council.

THESE two appeals, brought by special leave, were heard together. The first was from orders (February 22, September 8, and September 22, 1902) of the Court of the Political Agent, Kathiawar, now called the Court of the Agent to the Governor in Kathiawar. The second was from an order (January 14, 1904) of the Governor in Council of Bombay rejecting the appellant's appeal against an order of the Agent to the Governor in Kathiawar, and refusing the appellant's application for the execution of a judgment and decree of the Governor in Council of Bombay dated September 26, 1899, on the ground that both the judgment and decree had been reversed by His Majesty's Secretary of State for India in Council.

The main questions raised in these appeals were whether an appeal lies to His Majesty in Council from the Agency Courts in Kathiawar, or from a decision of the Governor in Council of Bombay on appeal from those Courts, and whether in a suit of which the subject-matter is one of municipal or civil law, and which has been duly heard and decided by those Courts in Kathiawar and by the Governor in Council of Bombay acting as a Court of Appeal therefrom, His Majesty's Secretary of State for India in Council has jurisdiction to reverse, alter or otherwise modify such decision.

The appellant in the first appeal sued under the circumstances stated in the judgment of their Lordships to enforce a mortgage of village Sardharpur in Jetpur, in Kathiawar, in the Court of the

J. C. 1905

HEMCHAND DEVCHAND v. AZAM SAKARLAL CHHOTAMLAL.

Assistant Political Agent, Sorath Prant. On November 24, 1901, that Court refused to entertain it without a certificate of the Political Agent consenting to the hearing. This order was on February 22, 1902, confirmed by the Court of the Political Agent. On September 22 of that year the same Court refused leave to appeal to His Majesty in Council, on the grounds that the appellant was not a British subject, but the subject of the independent State of Jetpur, and had, therefore, no birth-right of appeal to His Majesty in Council, but only to the sovereign of Jetpur; that the inhabitants of Jetpur and of the Kathiawar States were foreigners; that the jurisdiction exercised by the Agency Courts was native State jurisdiction; and that the said Courts were not British Courts from which an appeal lay to the King in Council. On May 16, 1902, pending the petitions for leave to appeal, the appellant was ejected from the village in suit by order of the Assistant Political Agent, which was confirmed by the Court of the Political Agent on September 8 following. On March 12, 1903, the appellant obtained special leave to appeal from the orders of the Political Agent; including a third one refusing leave to appeal.

In the second case the appellant instituted a suit (Political Case No. 15 of 1881—1882) in the Court of the Assistant Political Agent, Halar Prant, in Kathiawar, for redemption of a mortgage of the village Karmal Kodta. An application by the respondent to transfer it from the political to the civil side was refused in August, 1886, the refusal being affirmed on appeal by the Political Agent, and eventually by the Governor in Council of Bombay on June 15, 1887. The suit was said to have been tried in all respects in accordance with the ordinary procedure of the Court as regulated by Act XIV. of 1882. The Assistant's Court on April 19, 1897, dismissed the suit. The Political Agent affirmed this dismissal on appeal. The Governor in Council in September, 1899, reversed these dismissals on second appeal and decreed redemption; but on appeal to the Secretary of State the decision of the Governor in Council was reversed, and the decrees of the political officers in Kathiawar re-established. The appellant then applied to the Courts in Kathiawar for execution of the Governor's decree of

redemption in 1899 on the ground that the Secretary of State had no jurisdiction to reverse it, the subject of the suit being matter of municipal law and the Secretary of State in Council not being a Court of law or a Court of appeal from the final decision of a Court of law in India. These applications were refused, the Agency Courts, and eventually the Governor in Council, on January 14, 1904, holding that they were bound by the decision of the Secretary of State. On August 10, 1904, the appellant obtained special leave to appeal to the King in Council from the final order of the Governor.

Haldane, *K.C.*, and *J. W. McCarthy*, for the appellants in both cases, contended that an appeal lay to the King in Council from the Courts of Kathiawar—first, because Kathiawar was British territory inhabited by British subjects, and not foreign territory inhabited by the subjects of native sovereign princes; secondly, because the Courts in question were British Courts exercising jurisdiction in Kathiawar.

With regard to the first point it was contended that Kathiawar formed part of British India as defined in s. 18 of the Interpretation Act, 1889 (52 & 53 Vict. c. 63), it being a territory or place within His Majesty's dominions, which is for the time being governed by His Majesty through the Governor-General of India or through a governor or other officer subordinate to the Governor-General of India. The province of Kathiawar consisted of a number of small States under tributary chiefs or talukdars, who appear to have been about 400 in number. Prior to 1802 the whole province was divided between the Peshwa and the Gaikwar, who claimed over it sovereign rights, chiefly consisting of the exaction of tribute, and the sovereignty over the country was in the power to which tribute was paid. As regards the rights of this Peshwa, many taluks and villages and a considerable portion of Kathiawar were ceded to the British Government in 1802 by the Treaty of Bassein, and the rest of the rights of the Peshwa in those parts of Kathiawar which had not been transferred in 1802 were ceded to Great Britain in 1817. As regards the Gaikwar in 1807 a settlement was made for the payment to the British Government of the tribute payable

J. C. 1905

HEMCHAND DEVCHAND v. AZAM SAKARLAL CHHOTAM-LAL.

by Kathiawar chiefs to the Gaikwar, and since that date this tribute has been collected by the British authorities, who have then paid to the Gaikwar the share to which he is entitled under existing agreements, and in 1820 by a further agreement the Gaikwar engaged not to interfere in the province except through the British Government. Further, in 1807 and 1808 the chiefs entered into agreements giving a security bond for the general peace of the country and agreeing (inter alia) "to do nothing thenceforward without the sanction of the Government previously obtained." Since 1820 the supreme authority in Kathiawar, as far as it had been previously vested in the Peshwa or the Gaikwar, has been exercised solely by the British Government. Since that date Political Agents and other officers have been appointed to govern the province and the authority of the British Government has been generally exercised over the whole province. As regards the judicial administration, down to 1831, this was left in the hands of the chiefs without regular control. In 1831 the British Government established a Criminal Court of Justice under the presidency of the Political Commissioner for the trial (inter alia) of crimes committed by petty chiefs upon one another or otherwise than in the exercise of their recognized authority over their own dependents, and until 1853 every sentence of this Court was submitted to the Bombay Government for their approval. In 1862 the whole administration was re-organized, and the province was divided into four districts under political assistants with other British magistrates under them, all under the control of the Political Agent. At the same time the number of Kathiawar States under separate chiefs being 188, these chiefs were divided into different classes, on whom was conferred certain criminal and civil jurisdiction varying according to each class. All other jurisdiction both civil and criminal throughout the province beyond that allowed to the chiefs was reserved to the British officers and magistrates under the authority of the Political Agent, and this has been termed "residuary jurisdiction." Codes, moreover, both civil and criminal, have been promulgated establishing regular Courts of justice. The Civil Code distinguishes the chiefs of Kathiawar from "sovereign powers" or "independent

chiefs." Since 1862 the whole jurisdiction exercised by the chiefs has been treated as conferred upon them by the British Government. Since 1820 the chiefs in Kathiawar have in no sense been sovereign native princes or independent. Many of them are merely heads of villages, and have throughout been under the control and authority of and subject to the British Government. The Courts of the Assistant Political Agent, Sorath Prant, and of the Political Agent, Kathiawar, are British Courts in Kathiawar exercising the residuary jurisdiction reserved to the British authorities and are Courts of justice within a British possession, and for these reasons an appeal lies from them to His Majesty in Council under 7 & 8 Vict. c. 69. Reference was made to *Damodhar Gordhan* v. *Deoram Kanji* (1), in which the Privy Council went some way towards holding that Kathiawar is British territory; Ilbert's Government of India, p. 1; Hunter's Brief History of the Indian People, p. 160; to various minutes of the Government of India printed in the record, and in particular to Sir B. Frere's minute of March 21, 1863; Kathiawar Directory, 1886, Part II., pp. 822, 1182; Foreign Jurisdiction Act (XXI. of 1879), and Act XX. of 1876.

The Government of India has always possessed two sets of powers, one set derived originally from the Crown, but exercised at one time by the East India Company, and then in 1858 transferred to the Governor-General in Council, another set which grew up in the Crown, as its sovereignty grew, and was never parted with to the Company. The Foreign Jurisdiction Act (XXI. of 1879), and the Indian Order in Council, 1902, under the Imperial Foreign Jurisdiction Act, 1890 (see Statutory Rules and Orders, 1902, p. 174, No. 466), now regulate the exercise by the Governor-General of his prerogative powers which were always vested in the Crown. Acting under this prerogative authority, the Governor-General had power to determine the law and procedure to be observed by Political Agents in Kathiawar, and by so doing, indirectly restricted the sovereignty of the chiefs. The British Government is in receipt of tributes, maintains troops, exercises all civil and criminal jurisdiction through its own officers, except so far as it has conferred a limited jurisdiction

(1) (1876) 1 App. Cas. 332; S. C. 3 Ind. Ap. 102.

J. C. 1905

HEMCHAND DEVCHAND v. AZAM SAKARLAL CHHOTAMLAL.

on chiefs and landowners, and, as regards the powers which it confers, it exercises the fullest control. It also makes rules for the police and regulates the abkari, or excise. This extent of interference is sufficient to shew that the British Government has practically assumed the sovereignty of Kathiawar. Reference was made to various minutes of Government officers from 1821 to 1864 in support of this view of the political relations with Kathiawar.

It was contended that it was sufficient to establish the second ground of appeal, viz., that the Courts in question were set up by the King, like any other Courts; that if Kathiawar is foreign territory the Agency Courts are as much King's Courts as other extra-territorial Courts. In this case, however, they are not set up by any capitulations or treaties, but as the result of conquest and of sovereign power. They are Courts within the meaning of the Foreign Jurisdiction Act (53 & 54 Vict. c. 37), s. 16, and consequently an appeal lies therefrom to the King in Council. Further, they are Courts which are governed by the Indian Civil Procedure Code, which provides for such an appeal. The appeal can only be taken away by the prerogative. The decision of the Bombay High Court that Palitana in Kathiawar is a sovereign State, see *Ladkuvarbai* v. *Ghoel Shri Sarsanji Pratabsangji* (1), is based on Sir C. Wood's despatch of 1854, and is contradicted by the decision of the Calcutta High Court in *Empress* v. *Keshub Mahajun*. (2) And see also *Hursee Mahapatro* v. *Dinobundo Patro*. (3)

The distinction between "political" and "civil" suits in the Kathiawar Agency Courts is dealt with and regulated by numerous Government notifications, circulars, resolutions and rules of Court, the effect of which is that suits are to be considered as "political" when a chief of some specified class is a party, or when the case is one affecting the interests of the tributary chiefs, of whatever class, in regard to sovereign rights, jurisdiction, tribute, territory, boundaries, political status, or prerogative and certain other matters. The judges of the Agency Courts of Kathiawar exercise both executive and

(1) (1870) 7 Bomb. H. C. O. C. J. 150.

(2) (1882) I. L. R. 8 Calc. 985.

(3) (1881) I. L. R. 7 Calc. 523.

judicial authority, and if a "political" suit is instituted in which the subject-matter relates to civil rights of the parties arising out of contract or otherwise, and in which the matter is one of ordinary civil or municipal law, it falls within the judicial authority, and proceeds as an ordinary civil suit, with the exception that the parties are relieved from the payment of certain fees on instituting the suit. If a "political" suit raises questions outside the ordinary legal rights of the parties and outside matters of ordinary civil or municipal law, whether such questions affect the political status or rights of the parties, or are matters of general policy to be dealt with by the Government or its executive tribunals or officers, such suit falls within the executive authority of the Political Agent or Agent to the Governor, and does not proceed as an ordinary civil suit.

The first of these suits was a civil suit. The second was originally entered in the Agency Court of Halar Prant as a "political" case, solely because the parties thereto were members of the specified class of chiefs, and were therefore entitled to privileges such as the exemption from payment of institution fees in the Court, but as far as regards its subject-matter the suit was an ordinary civil suit for the redemption of a mortgage, and raised only questions of civil or municipal law and of the rights of the parties under contract.

Cohen, K.C., and *Phillips*, for the respondents in the first appeal, contended that no appeal lay to the King in Council. They contended that Kathiawar was not a part of British India, but was native territory under the suzerainty of His Majesty. On the further question raised by the appellant, they contended that the Courts were not British Courts exercising British jurisdiction, but were tribunals exercising a jurisdiction conferred on them by the executive authorities, and limited by rules prescribed by them from time to time. The 780 native States of India are not subject to the Crown, though to a certain extent in a state of dependence thereon. In *Damodhar Gordhan's Case* (1) it was held that the Government could not remove any part of British India from the ordinary jurisdiction of the British Courts. If, therefore, Kathiawar is in British India, the Courts

(1) 1 App. Cas. 332.

J. C. 1905

HEMCHAND DEVCHAND v. AZAM SAKARLAL CHHOTAMLAL.

of the Political Agents had no jurisdiction to deal with the case, being illegally established; and all notifications and rules issued in regard to them were invalid. Only Courts established by the Legislature would have jurisdiction. In *Queen* v. *Burah* (1) it was held that, by enactments of Parliament or of the Indian Legislature, any part of British India might be removed from the jurisdiction of the ordinary Courts. No Act has been passed relating to the Courts of Kathiawar. The Executive can only establish Courts therein if it be outside British India. The province of Kathiawar was, and is, governed by a large number of native Rajpoot chiefs, independent of one another, who formerly paid tribute to the Peshwa and the Gaikwar of Baroda, two Mahratta chiefs, subordinate in theory to the Great Mogul at Delhi. In 1802, by the Treaty of Bassein, the Peshwa ceded part of his claims to tribute to the British Government, then represented by the East India Company (Aitchison's Treaties, 3rd ed. Vol. VI. p. 53). The East India Company thereafter, in concert with the Gaikwar, collected the Kathiawar tribute. The Peshwa in 1803 or 1804 farmed his rights to the Gaikwar for ten years. In 1817 he ceded whatever rights remained to him to the East India Company, and in 1820 the Gaikwar made a similar cession. Thereafter engagements were entered into between the chiefs, who mutually guaranteed the performance of each other's obligations, and the Indian Government, by which the chiefs agreed to pay a tribute fixed in perpetuity, with security for its due payment, and the British Government undertook to protect them from oppression, and engaged that the Mulkgiri (2) army should not be employed as theretofore. The chiefs were left perfectly independent in their internal administration; the paramount power (which was the East India Company from 1820) not then claiming and never having exercised any right to interfere in their internal administration except for the better security of the tribute. The question of

(1) (1878) 3 App. Cas. 889; S. C. L. R. 5 Ind. App. 178.

(2) "Periodical progress or incursion of a military force for the collection of tribute or revenue by violence or intimidation": Wilson's Glossary, *s.v.* This meaning seems purely local. In old Anglo-Indian cacography, "mooluckgerry." Wilson by a strange slip misspells the common word *mulk* with a final *qáf*.—F. P.

fact, whether Kathiawar is or is not a part of British India (see 52 & 53 Vict. c. 63, s. 18, and the Indian General Clauses Act X. of 1897, s. 3, sub-ss. 7 and 23), can only be determined in one of two ways, either by studying the past relations between the Crown or Indian Government and the States of Kathiawar, or by obtaining information from the Secretary of State, as was done in *Taylor* v. *Barclay* (1), and *The Charkieh*. (2) Such a proceeding is permitted by the Foreign Jurisdiction Act, 1890 (53 & 54 Vict. c. 37), s. 4. Various opinions of leading officers of the British and Baroda Governments, and despatches given in the record, were referred to as shewing that Kathiawar was regarded as a foreign country, subject to occasional interference if peace and order required it. The Bhaunagar Act of 1876 is the only instance of Indian legislation with regard to Kathiawar, and by that Act the Government disclaimed the territory. It is not a scheduled district under Act XIV. of 1874. Not being part of British India, the Governor-General in Council had power in his executive capacity (see Ilbert's Government of India, pp. 452, 455, 458, 459, and 574), as regulated by Act XXI. of 1879, to issue the notification in dispute in this case (June 22, 1900) and to entrust power to his executive officers to administer justice subject to his directions. If it were part of British India, the Legislature alone could establish judicial Courts and authority. The notifications in the Kathiawar Directory shew how the Political Agents' Courts were established, what appeals were allowed, and what law was administered. A Political Agent (see s. 3 of Act XXI. of 1879) is an officer appointed by virtue of the executive authority to watch over peace and good order in a native State, and is invested with a certain kind of jurisdiction. By Macpherson's List of British Enactments in Force in Native States, published by authority of the Government of India, the Kathiawar Agency is included amongst the native States. The appellant's only remedy is to apply to His Majesty, who could, under s. 4 of 3 & 4 Will. 4, c. 41, refer the matter to this Board: see the case of the *Nawab of Surat* (3), and Safford and Wheeler's Privy Council, pp. 769, 770.

(1) (1828) 2 Sim. 213, 220. (2) (1873) L. R. 4 A. & E. 59, 74.
(3) (1855) 9 Moore, P. C. 88.

J. C.
1905
HEMCHAND DEVCHAND v. AZAM SAKARLAL CHHOTAMLAL.

Sir E. Clarke, K.C., and *Birdwood*, for the respondent in the second appeal, contended that the decision of the Governor of Bombay in Council in September, 1899, in favour of the appellant had been validly (see 21 & 22 Vict. c. 106, s. 3) reversed by the Secretary of State, and that after that reversal there remained no decision in his favour capable of being executed against the respondent. Consequently the subsequent order of the Governor in Council refusing execution was a valid order and it was moreover a political act. They contended that the Agency Courts in Kathiawar which dealt with this case, are not Courts of justice within a British possession within the meaning of 7 & 8 Vict. c. 69 nor British Courts in a foreign country within the meaning of 53 & 54 Vict. c. 37. The preamble of the Bhaunagar Act of 1876 recognizes that Kathiawar is not British territory: and see *Ladkuvarbai* v. *Ghoel Shri Sarsangji* (1); *Triccam Panachand* v. *Bombay, &c., Ry. Co.* (2); *Queen-Empress* v. *Abdul Latif.* (3) It has never been vested in the British Crown under 21 & 22 Vict. c. 106, and is not governed by His Majesty within the definition of British India in s. 18 of the Interpretation Act, 1889, and s. 3, sub-s. 7, of Act X. of 1897; certain powers of government are exercised, but not in such a way as to displace the native sovereignty. There are very important powers which are not exercised. As regards legislation the Indian Legislatures have never made and cannot make laws for Kathiawar. Under the Indian Councils Act, 1861, s. 22, the Governor-General for India in Council can legislate for certain persons within the province, but not in respect of Courts of justice or places or things. The Agency Courts were set up by compact with the chiefs, that is, in pursuance of Colonel Walker's famous settlement of 1807, not by legislation; and are Courts of the native States if Courts at all. Where Indian Acts or adaptations of them have been introduced into Kathiawar they have been applied by executive order, not by legislation, and are merely rules of procedure for the guidance of political officers. The revenue system was examined to shew that it was conducted by the chiefs as their own freed from British jurisdiction or control. So also the police administration was left

(1) 7 Bomb. H. C. R. O. C. J. 150. (2) (1885) I. L. R. 9 Bomb. 244.
(3) (1885) I. L. R. 10 Bomb. 186.

in the hands of the native States. Interference has been confined to the judicial administration ; but only a tenth part of the litigation of Kathiawar is dealt with by Political officers exercising jurisdiction on behalf of the chiefs. The inherent jurisdiction of the chiefs extends to all litigation in their territories, but while they are under disqualification it is exercised by the British Government : see the Directory, Part I., 1886, p. 276, Part II., 1886, p. 453, and Macpherson's Enactments in Force in Native States, p. 42.

Kathiawar has never been subject to the system of jurisprudence applicable to British India. Its chiefs have their own Courts and codes of law. The Courts of the political officers are not governed by British laws, but by special rules of procedure prescribed for their guidance : see Kathiawar Directory, Part II., 1886, pp. 822—824, 1182. They are in fact not Courts of justice, though described as such ; certainly not British Courts established by law. Their decisions are guided by political considerations. The cases dealt with by them are classed as civil and political ; but the same officers deal with both classes. The nature of political suits is described in Kathiawar Directory, Part I., 1886, p. 276 ; Part II., 1886, p. 453 ; and Part III. 1896, pp. 38 and 40. In hearing them the Agent as representing the paramount power arbitrates diplomatically between the parties. The present case is undoubtedly political, and the decision of the Governor in Council is not a judgment of a Court acting on principles and rules which the Judicial Committee can investigate and apply. This Board cannot be guided by the same considerations which control the Political Agents. The suzerainty of the Crown has been delegated to them through the Government of India. The laws which have been introduced are so many rules of procedure within the meaning of s. 5 of Act XXI. of 1879. This second appeal is an interstatal case involving sovereign rights over a particular village. The political jurisdiction exercised in such a case is one of the methods by which the suzerainty of the Crown is exercised and is entirely distinct from the jurisdiction exercised by the High Courts in British India and by His Majesty in Council in appeal therefrom : see *Maharajah Madhava Singh* v. *Secretary of State for India in Council.* (1) Formerly the appeal lay from the Governor

(1) (1904) L. R. 31 Ind. Ap. 239.

J. C. 1905 HEMCHAND DEVCHAND v. AZAM SAKARLAL CHHOTAM-LAL.

in Council in such cases to the Court of Directors. Under s. 3 of 21 & 22 Vict. c. 106 it is to the Secretary of State. It cannot be contended that this long-established procedure was wrong; but if Kathiawar was part of British India no such appeal would lie, and the decisions would have been coram non judice in every case from the Assistant Political Agent up to the Governor in Council.

Haldane, K.C., replied in both appeals.

1905 *Dec.* 18.

The judgment of their Lordships was delivered by

SIR ARTHUR WILSON. The first of these appeals arises out of a suit instituted in a Court of the Assistant Political Agent of Sorath Prant, in Kathiawar (the term Prant meaning an administrative district). The grounds of the plaintiff's claim, so far as it has now to be noticed, were that in February, 1893, he had advanced money to the late Darbar Shri Vala Naja Mamaiya, a shareholder in the chiefship or talukdari of Jetpur Chital in Kathiawar, for the purpose of paying off debts due by the latter, who was a talukdar of the sixth class, and that the plaintiff had acquired possession; that Vala Naja died in May, 1901; and that the plaintiff's rights as mortgagee had been interfered with or threatened by the nominal defendant as manager for the substantial defendants, the successors of the deceased chief. The plaintiff prayed for a declaration of his rights and an injunction. In effect, therefore, the suit was one to enforce a mortgage made by a deceased chief against his successors. The Assistant Political Agent dismissed the suit, basing his decision upon a notification of the Government of India, in the Foreign Department, of June 22, 1900, which laid down, for the guidance of the Agency Courts in Kathiawar, the rule that: "No suit shall lie against a tributary chief or talukdar . . . . in respect of any debt contracted by the predecessor of such chief or talukdar or sub-sharer unless (*a*) the claim has been admitted by the tributary chief or talukdar or sub-sharer; or (*b*) the debt has received the written approval of the Political Agent."

Against that decision the plaintiff appealed to the Political Agent, who, on February 22, 1902, dismissed the appeal. On September 8, 1902, the Political Agent dismissed another appeal

by the plaintiff against an order of the Assistant Political Agent awarding the defendants possession of the property in dispute. By a third order of September 22, 1902, the Political Agent dismissed two applications of the plaintiff, one for a certificate that the case fulfilled the conditions necessary to support an appeal to His Majesty in Council, the other for leave to bring such an appeal. Against these three orders of the Political Agent the present appeal has been brought.

The plaintiff being dissatisfied with these orders of the Political Agent, his ordinary and regular course would have been to appeal to the Governor of Bombay in Council. But he made an application to His Majesty in Council for special leave to appeal without going first to the Governor in Council, and in accordance with their Lordships' advice, His Majesty in Council granted special leave so to appeal, but with leave to the Secretary of State for India to intervene, and put in a case and appear; in the result the India Office acted for the respondent. The appellant having been thus allowed to come before this Board without first going to Bombay, their Lordships think that the leave so given cannot have the effect of placing the appellant in any better position than he would have been in if he had followed the usual course and had a decision against him by the Governor in Council. So that in this respect, the case stands on the same footing as the second of the present appeals.

The second appeal arises out of a suit instituted by the Thakor of Kotda-Sangani (a Kathiawar State) in the Court of the Assistant Political Agent, Halar Prant, against the State of Gondal, a State of the first class, to redeem and recover possession of a village said to have been transferred by way of mortgage to the latter State by the former. The suit was dismissed by the first Court, and that dismissal was upheld by the Political Agent, Kathiawar. Upon appeal the Governor of Bombay in Council reversed that decision, and gave a decree for redemption. A further appeal was brought to the Secretary of State in Council, who reversed the decision of the Governor in Council.

After various proceedings before the tribunals in Kathiawar, in which the plaintiff sought unsuccessfully to execute the decree of the Governor in Council, notwithstanding its having been

J. C. 1905

HEMCHAND DEVCHAND v. AZAM SAKARLAL CHHOTAMLAL.

reversed by the Secretary of State, he appealed to the Governor in Council, and asked him to order the execution of his own decree. By an order of January 14, 1904, the Governor in Council refused the application. And against that order the plaintiff has brought the second of the present appeals, having obtained special leave to do so, granted upon the same terms as the leave granted in the first case.

These two appeals were heard together. The question common to both cases, and the only question which has been argued, is whether an appeal lies to His Majesty in Council. And the answer to that question depends mainly upon the true relation of the Kathiawar States and their people to the British Crown, and upon the nature and character of the control exercised by the British Indian authorities over the administration of justice in those States.

Prior to the year 1802 Kathiawar consisted of a large number of States, independent of one another, each governed by its own chief, but paying tribute in part to the Peshwa and in part to the Gaikwar of Baroda. It is necessary to review certain events that have occurred since that date, but they can be dealt with very briefly; the more so because Kathiawar in its relations with the British Indian Government has commonly been dealt with as a whole; and it may be so dealt with on the present occasion, for the cases presented by the present appellants do not depend upon any circumstances peculiar to the particular States which, or whose rulers or people, are affected, or upon any consideration not applicable to the whole province.

The time under consideration divides itself naturally into two periods, that of the government of British India by the East India Company down to 1858, and that of the direct government by the Crown after that date.

The legal and constitutional position of the Company during the former of these periods was established in a series of judicial decisions, and was finally and fully defined in *The Secretary of State in Council* v. *Kamachee Boye Sahaba.* (1) The Company exercised a delegated sovereignty over the territories under its government, with all the powers in connection with the external relations of those territories incidental to the exercise of that

(1) (1859) 7 Moo. Ind. App. 476.

sovereignty, subject, of course, to such restrictions as were imposed by charter or by statute.

It is obvious that the sovereign power thus delegated to the Company could be exercised by it in India only through its agents and officers in the country. Before the Regulating Act of 1773 (13 Geo. 3, c. 63) the three Presidencies in India were wholly independent of one another; in the government of each, and in the dealings of each with the native States in its neighbourhood, the Company acted through its officers charged with the administration of that Presidency. By the Regulating Act the Governments of Madras and Bombay were placed under the superintendence and control of the Governor-General of Bengal (since become Governor-General of India) and his Council, and close restrictions were placed upon their power of making war or peace or concluding treaties without the approval of the Central Government. Subsequent statutes expressed with greater clearness the subordination of the lesser Governments, and repeated the restrictions upon the exercise by them of various sovereign powers. But subject to that subordination and to those restrictions, those statutes never took away those powers, but, on the contrary, repeatedly recognized their existence. And accordingly in *The East India Company* v. *Syed Ally* (1) this Board held that a treaty entered into by the Government of Madras, after compliance with the statutory conditions, was a valid exercise of sovereignty. It is well to notice this point, because much that has now to be considered has to do with the action of the Government of Bombay. And as no question has been raised as to the Bombay Government having at all times obtained all necessary sanction, the distinction between the two Governments need not be further noticed.

By the Government of India Act, 1858, the delegation of sovereign power to the Company was determined, and it has since been exercised directly on behalf of the Crown, in India (speaking generally) through the same authorities as before, in England through the Secretary of State.

Under the sovereign power thus delegated for so long to the Company, and since 1858 exercised directly on behalf of the

(1) (1827) 7 Moo. Ind. App. 555.

J. C. 1905 HEMCHAND DEVCHAND v. AZAM SAKARLAL CHHOTAMLAL.

Crown, the British Empire in India has been built up. Under it new territories have been added to the actual dominions of the Crown; and under it many and various powers, rights, and jurisdictions have been acquired and exercised over territories which yet remain outside the King's dominions. Of the divers ways in which new lands have been brought under the King's allegiance it is unnecessary here to speak. As to the rights and powers of control possessed and exercised over the native States in India with the corresponding restrictions upon the independent action of those States, some, no doubt, are the necessary consequence of the suzerainty vested in the predominant power. Thus, as is recited in 39 & 40 Vict. c. 46, the Indian States in alliance with the Crown, have "no connexions, engagements, or communications with foreign powers." But apart from and beyond the consequences, whatever they may be, flowing from this general source, rights of very varying kinds have been established in connection with the several States. They have different historical origins. The Indian Foreign Jurisdiction and Extradition Act XXI. of 1879 (following the language of the Imperial Act) recites that "by treaty, capitulation, agreement, grant, usage, sufferance, and other lawful means the Governor-General of India in Council has power and jurisdiction within divers places beyond the limits of British India." And that Act proceeded to regulate the exercise of that jurisdiction so far as it was competent for the Indian Legislature to do so, that is to say, so far as it affected persons for whom that Legislature could make laws. The present cases are outside the scope of that legislation.

Such rights over foreign territory differ not only in origin but in kind and in degree in the cases of different States; so that in each instance in which the nature or extent of such rights becomes the subject of consideration, inquiry has to be made into the circumstances of the particular case. In accordance with this, in *Muhammad Yusuf-ud-din* v. *Queen-Empress* (1), in which the question was as to the nature and extent of the railway jurisdiction vested in the British Indian authorities within the dominions of the Nizam, the case was decided upon the construction of the correspondence in which the cession of the

(1) (1897) L. R. 24 Ind. App. 137.

jurisdiction was embodied. In the present cases the inquiry is as to the relation of the Kathiawar States and their people to British India, and the character of the control exercised by the British Indian Governments over those States, and particularly with relation to the administration of justice.

It has already been said that, prior to 1802, the numerous States of Kathiawar were independent of one another, but paid tribute in part to the Peshwa and in part to the Gaikwar. By treaties of 1802 and 1817 the Peshwa's rights were ceded to the East India Company. In 1820 the Gaikwar's rights were ceded.

What the nature of the power of the Peshwa and of the Gaikwar was, regarded as a matter of right, and what therefore they ceded to the East India Company, was the subject of frequent and anxious inquiry on the part of the Board of Directors and the Government of Bombay, but no satisfactory result was ever arrived at; and it would be almost hopeless at the present time to attempt to answer that question upon the basis of contemporary evidence. Perhaps the whole truth is told in a sentence of a despatch of the Court of Directors of November 8, 1831: "It can scarcely be doubted, however, that the rights of the Maratta Governments were whatever they found it convenient to claim and had power to enforce." Their Lordships are happily not called upon to enter into any inquiry so difficult as this. The control of the British Indian Government over Kathiawar has been in operation without controversy for a very long series of years. And the nature and character of that control must be ascertained from the manner in which, and the principles upon which, it has, in fact, been exercised. The history of this is therefore of primary importance.

In 1807, at a time when the rights of the Peshwa had been partially, but not completely ceded, and when those of the Gaikwar were still in full force, Colonel Walker was sent to Kathiawar for the purpose of putting an end, as far as might be possible, to the disorders prevailing in the province. In a later despatch of the Court of Directors, of September 15, 1824, it is said: "The objects of the Company's interference in Kathiawar in 1807 were to induce the chiefs to enter into a permanent engagement for the payment of the claims of the

J. C. 1905

HEMCHAND DEVCHAND v. AZAM SAKARLAL CHHOTAMLAL.

Guicowar Government" (the Peshwa's tribute was at that time farmed to the Gaikwar) "without the periodical Mooluckgerry Circuit, which devastated the country in its progress and absorbed the tribute in its expense, and at the same time to obtain security for the discontinuance of mutual aggression and predatory excursions." Colonel Walker brought about a settlement to which the Gaikwar's Government and the chiefs were parties, of which it is enough to say that it provided for a fixed tribute from each State, secured by a system of mutual guarantees, that tribute to be received by the Company, which should account to the Gaikwar for what was due to him, for the cessation of the Mooluckgerry (1) invasions, and for the maintenance of peace and order between the States themselves.

The next period which it is necessary to consider is 1819 and the few following years. The arrangements made by Colonel Walker for securing the tribute had not been completely successful. Two different officers were instructed to investigate the conditions of the problem. Amongst the subjects of inquiry prescribed one was: "In whom do the chiefs of Kattywar conceive the sovereignty of their country to reside; in the chiefs themselves, the King of Delly [*sic*], or the Governments to whom they pay tribute?" with a number of other inquiries bearing on the same question. Reports were received, the Government of Bombay expressed its views, and the subject came before the Court of Directors in 1824, who, in the despatch to Bombay already referred to of September 15, 1824, dealt thus with the subject: "In your 49th paragraph, Colonel Walker's opinion that the chiefs were otherwise independent, though paying a forced tribute, is questioned, and an inquiry is intimated into the general rights of the British and Gaicowar Governments over the chiefs of Kathiawar. . . . . The right of preserving the peace of the country, which you assumed in paragraph 48, appears here to be questionable, and is made to rest on questionable precedents. If Colonel Walker acted on a supposed right he did not thereby make it a real one. But it is at least doubtful if the Maratha Governments in point of fact ever claimed more than tribute. There is no evidence that they ever

(1) See note at p. 52, ante.

interfered to maintain the peace of the country, or that they ever sequestrated talooks for means of tribute. The proposed inquiry must therefore resolve itself into this, whether we have derived from them the right of doing the same precise things which they did and nothing more, or the right of directing the same general power to different specific objects according to the difference of our policy."

In 1825 further difficulties had arisen, which the Government of Bombay dealt with as best it could; and on November 23, 1825, the Government addressed to the Court of Directors a letter in which the constitutional position of Kathiawar was very cautiously dealt with. The reply to this and other letters was contained in a despatch of the Court of Directors of July 20, 1830, in which they said: "All the rights which we possess in Kattywar were acquired from the Peshwa and the Guicawar, from the former by conquest, from the latter by mutual arrangements. These rights we considered as limited to the exaction of a tribute with the power of taking such measures as might be essential to the security of that tribute. Beyond this we did not propose to interfere, and we determined to treat the Kattywar tributaries as independent chieftains entitled to the uncontrolled exercise of the power of Government within their own territories, and subject only to the obligation of not molesting our subjects, our allies, or one another, and of paying the stipulated tribute to the Guicawar and to ourselves."

By the year 1830 it was found that disorders still prevailed in Kathiawar, due apparently to the weakness of some of the chiefs. And the Bombay Government instructed the Political Commissioner to visit Kathiawar twice annually, and try persons guilty of capital crimes in the territories of those petty States whose chiefs might be too weak to punish them. The Court of Directors in 1834 approved this plan, adding: "We are glad to find that it has the complete concurrence of the chiefs themselves."

In 1847 it appears that questions arose as to whether offences committed in Kathiawar by sepoys in the Company's service, and by camp followers, were to be tried by court-martial as offences committed in foreign territory, and the decision of the Bombay Government was in the affirmative.

J. C. 1905

HEMCHAND DEVCHAND v. AZAM SAKARLAL CHHOTAMLAL.

In a despatch of March 31, 1858, the Court of Directors, referring to an opinion expressed by the then Resident of Baroda, said: "We cannot dismiss the correspondence which has arisen out of these questions of jurisdiction without expressing our surprise that an officer in the high political position occupied" (by the officer in question) "should have declared his opinion that the whole province of Katteewar, with the exception of the districts of the Gaekwar, is British territory, and its inhabitants British subjects."

In and before the year 1863 a further reorganization was found to be necessary, and, as might be expected, the question as to the status of Kathiawar again arose. In 1863 the members of the Bombay Government, in carefully reasoned minutes, maintained the proposition that Kathiawar was British territory. The Government of India did not indorse this view, but in a despatch of April 14, 1864, to the Secretary of State, while discussing the proposed new arrangements, they said: "The next question refers to the law and the system which should be applied to Katteewar. For the due solution of this question it is necessary first to decide whether Katteewar is foreign or British territory; and until we receive an expression of the views of Her Majesty's Government on the question discussed in our separate despatch, the law as at present in force must remain." On the point thus submitted the reply of the Secretary of State, in a despatch of August 31, 1864, was this: "I have read with interest and attention all the arguments which have been adduced on either side by the several members of the Government of India and of Bombay. It is not necessary that I should examine in detail these conflicting arguments, or record an opinion with respect to their relative weight. It is sufficient to say that the chiefs of Katteewar have received formal assurances from the British Government that their rights will be respected, and that the Home Government of India, so lately as 1858, repudiated the opinion that the province of Katteewar was British territory, or its inhabitants British subjects." The arrangements then made will be considered later.

During the period which has hitherto been under consideration, and in subsequent years, the political control exercised over

Kathiawar has been very complete, but it has been exercised in different degrees in different classes of Kathiawar States. The question of judicial administration will be more fully considered hereafter; at present it may be convenient first to notice a few other points.

It has never been claimed that British Indian law, as such, is operative in Kathiawar; nor, on the other hand, have the Kathiawar States been included in the Scheduled Districts Act (XIV. of 1874), which enumerates certain of the districts forming part of British India, but to which the general law is not necessarily to apply. The British Indian Legislature has never purported to legislate directly for Kathiawar or its inhabitants; but, on the contrary, in the Indian Act, XX. of 1876, it is expressly recited, with regard to an important territory in Kathiawar, that "the British Government have exercised certain powers of government over the said territory, but such territory has never been treated as being British territory, nor as having been vested in the East India Company nor in Her Majesty the Queen of Great Britain and Ireland and Empress of India, and the said Kathiawar villages have consequently never been subject to the laws in force in the Presidency of Bombay." The chiefs, at least in the larger States, have exercised the power of making laws for their own subjects. The police administration has been in their hands. The general revenues have been received and applied by the chiefs, and it appears from a work of high authority (1) that in many cases the revenue is a sum many times as great as the tribute.

As to the course pursued with regard to judicial administration it has already been stated that under the arrangement sanctioned by the Court of Directors in 1834, authority was given to the Political Commissioner to try persons guilty of capital crimes committed in States whose chiefs were too weak to punish them. It may be added that under that scheme sentences passed by the Political Commissioner were subject to the approval of the Bombay Government.

In all subsequent arrangements, the first thing to be noticed is, that they were all carried out, not by any legislative action,

(1) 6 Aitchison, 3rd ed. (1892), pp. 187 et seq., and Appendix 9, p. 48.

J. C. 1905

HEMCHAND DEVCHAND v. AZAM SAKARLAL CHHOTAMLAL.

but by orders or resolutions of the Executive Government, a course of proceeding which was appropriate if Kathiawar was foreign territory, but quite irregular if it formed part of the dominions of the Crown.

A fairly complete organization of the province was carried out in 1863. The general nature of that settlement is very concisely described in 6 Aitchison, p. 183: "The administration was re-organized by arranging in seven classes all the chiefs of Kathiawar, and defining their powers and the extent of their jurisdiction. The country was divided into four districts, or 'prants,' corresponding with the ancient divisions of Kathiawar, and European officers were appointed to these districts to superintend the administration generally, and more particularly to try inter-jurisdictional cases and offenders who had no known chief, or who were under such petty landholders as might be unable to bring them to trial."

Under the arrangement then made, modified as it has been in some respects by subsequent orders, the chiefs of the first class, who are not many in number but who rule over wide areas, can try any person except a British subject, even for a capital offence, without any permission from the Political Agent, and their civil jurisdiction is unlimited. The jurisdiction of the chiefs in the second class, who also rule wide areas, is very nearly the same as that of those in the first. The chiefs in the third and the fourth classes have still very wide powers. These are much less in the following classes, down to the seventh, in which the chiefs have very trifling criminal and no civil jurisdiction. In the cases which fall within the power of the chiefs their decision is final, and no judicial appeal lies to any British authority.

British officers have been appointed to deal with the classes of cases withdrawn from the jurisdiction of the chiefs themselves. Those officers and their tribunals are of three classes: (1.) Subordinate Courts—which need not be further noticed in dealing with these appeals; (2.) Assistant Political Agents' Courts; (3.) the Court of the Political Agent. To the latter officer is attached a judicial assistant, whose Court forms part of that of his chief. The titles of the Political Agent and of the Assistant

Political Agents have now been altered; but the change appears to have been only one of name, and need not be further noticed. The Assistant Political Agents have jurisdiction in all classes of cases; but an appeal lies to the Political Agent, who, according to circumstances, hears it himself or refers it to his judicial assistant.

The cases that come before the Assistant Political Agents, and on appeal from them before the Political Agent, are divided into two classes, political and civil. This division has long been maintained. It is clearly recognized in rules laid down by the Governor in Council in 1874 and in 1883. A fresh set of rules was issued in 1902, in which express instructions are laid down as to what cases should be regarded as political. In this the rules seem, on the face of them, to go beyond their predecessors. But in the despatch of August 8, 1902, which communicated the new rules to the Secretary of State, the Government of Bombay said: "The Rules are simply an issue in authoritative form of existing orders, and contain no new matter" except certain points not now material.

What is laid down in the Rules of 1902 is as follows:—

"2. The following suits should ordinarily be considered political:—

"(i.) Suits to which a chief of any of the first four classes is a party.

"(ii.) Cases affecting the interest of the tributary chiefs, of whatever class, in regard to sovereign rights, jurisdiction, tribute or allied payments, maintenance to members of the chief's family, compensation for injury done by outlaws or highway robbers, territory, boundaries, political status or prerogative.

"*Explanation.*—Claims for inheritance or partition of estates in the families of chiefs below the fourth class should ordinarily be heard as civil suits, but this does not include cases which raise the issue of a right of succession to a chiefship to which jurisdictionary powers are attached, or an issue of an inheritance to, or partition of, any estates in which a jurisdictional chief or tribute-paying talukdar has an interest direct or indirect."

J. C.
1905
HEMCHAND DEVCHAND v. AZAM SAKARLAL CHHOTAMLAL.

In political cases the Political Agent hears the appeals himself. He is to regard his function as "diplomatic or controlling," and to dispose of the cases "as he thinks proper." Civil appeals he is ordinarily to refer to the judicial assistant.

Of the two appeals now before their Lordships, the first arises out of a case classed as civil, the second out of one classed as political.

From the Court of the Political Agent appeals lie, subject to certain rules, to the Governor of Bombay in Council. And since as far back as their Lordships have been able to trace the matter, a further appeal has been entertained by the Secretary of State in Council.

The first ground upon which it was sought to maintain the competence of the present appeals was that the province of Kathiawar is British Indian territory, and its people within the King's allegiance, and that an appeal lies from the Courts of that province, and from those within the King's dominions, who hear appeals from that province, as from other Courts within British territory.

In support of this contention reliance was placed, first, upon the case of *Damodhar Gordhan* v. *Deoram Kanji* (1), the judgment in which was said to suggest an opinion that Kathiawar was British territory. It is true that there are passages in that judgment which may fairly be cited as favourable to the contention of the appellants. But in that case the question did not arise for decision, and their Lordships neither decided it nor expressed any opinion upon it. Nor were the materials for a decision which are now before their Lordships then before this Board. That case, too, was one between private persons, in which the Secretary of State was not represented. Reliance was further placed upon opinions expressed by persons of high authority to the effect that Kathiawar was British territory. But the opinions so expressed were overruled by higher authority. Stress was laid, lastly, upon the great extent of the control exercised by the British Indian Governments over the administration of the Kathiawar territories, which it was argued amounted to an actual assumption of sovereignty.

(1) 1 App. Cas. 332.

On the other hand, there are the repeated declarations by the Court of Directors and of the Secretary of State that Kathiawar is not within the Dominions of the Crown. Those declarations were no mere expressions of opinion. They were rulings by those who were, for the time being, entitled to speak on behalf of the sovereign power, and rulings intended to govern the action of the authorities in India, by determining the principle upon which they were to act in dealing with Kathiawar.

Those rulings have, in fact, been acted on. Many and various as have been the forms of intervention by the British Indian powers in the affairs of Kathiawar, and large as has been the political control exercised over the province, any assertion of territorial sovereignty has been avoided. No legislative power over it has ever been claimed. The intervention has never been carried further than was judged necessary, in the emergency, for the maintenance of peace, good order, and security. The position of the chiefs has always been respected; and, at least in the case of the more important among them, many of the functions commonly regarded as attributes of sovereignty have been preserved to them. The form adopted in establishing and regulating tribunals in the province has been that which was regular and appropriate if it was not British territory, but quite irregular and inapplicable if it was. And in the first of the appeals now before their Lordships counsel for the Secretary of State disclaimed the view that Kathiawar is within the King's dominions, and maintained that it is not so.

Their Lordships are of opinion that Kathiawar is not, as a whole, within the King's dominions, and it has not been shewn, or indeed contended, that the particular territories out of which these appeals arise are in a different position in this respect from the province generally. The first ground, therefore, upon which it has been sought to sustain these appeals fails.

The second ground upon which it was sought to base the competency of these appeals was that, assuming Kathiawar not to be a part of the King's dominions, still the Courts of the Assistant Political Agents, that of the Political Agent, and that of the Governor in Council, are all the King's Courts, and that the decisions of those tribunals in the present cases were judicial

J. C. 1905

HEMCHAND DEVCHAND v. AZAM SAKARLAL CHHOTAMLAL.

decisions by those Courts, and therefore subject to review by His Majesty in Council.

In the Court of the Political Agent this contention was disposed of in the first of the present cases upon the short ground that the appellant is not a British subject, and that the right of appeal to the King in Council "is a birthright and appertains only to British subjects, unless specially conferred by legislative enactment." Their Lordships are unable to concur in the view thus expressed. They think that if a Court, administering justice on the King's behalf, makes an order, judicial in its nature, by which some one is unjustly and injuriously affected, the person aggrieved is not precluded from applying to the King in Council to redress his wrong merely by the fact that he is not the King's subject.

The real question is whether in cases like those now before their Lordships the action of the tribunals in Kathiawar, and of the Governor in Council on appeal from those tribunals, is properly to be regarded as judicial or as political. And at this point a distinction arises between the two cases under appeal, because the first of them has been disposed of as a civil, the second as a political, case.

As to the cases classed as political, their Lordships think there is no room for doubt. The rules issued from time to time for the guidance of the Political Agent treat the disposal of such cases as falling within his "diplomatic or controlling function," and direct him to dispose of them "as he thinks proper." And all the other provisions relating to such cases indicate purely political and not judicial action.

The question relating to cases classed as civil gives rise to more difficulty, but, upon the whole, their Lordships are of opinion that no substantial distinction can be drawn for the present purpose between the two kinds of cases.

There is not necessarily any inherent distinction between the nature of political cases and of those treated as civil. It depends in some cases solely upon who are parties to the suit. The two cases now before their Lordships illustrate this. The first of them was a suit brought to enforce a mortgage, the second was a suit to redeem a mortgage, yet one of the cases is civil

and the other political, because in the latter a talukdar above the fourth class is a party.

The Political Agent is empowered to transfer political cases to the civil class, and dispose of them as such, and this power he is encouraged, and indeed directed to exercise freely.

The instructions from time to time issued by Government as to the disposal of cases suggests strongly that the exercise of jurisdiction, both by the Political Agent and by the Courts below him, is to be guided by policy rather than by strict law. This is illustrated by the notification of Government of June 22, 1900, already referred to, on the strength of which the first of the present cases (a civil case) was decided. That notification appears to follow upon a series of earlier instructions substantially to the same effect. It lays down that "no suit shall lie against a tributary chief or talukdar, or against any subsharer of a tributary chief or talukdar, in respect of any debt contracted by the predecessor of such chief, or talukdar, or subsharer unless" one or other of two conditions is complied with, one of which conditions is the approval of the Political Agent. In the grounds of appeal before their Lordships questions are raised as to the construction and effect of the notification just cited. But quite irrespective of those questions, there is no doubt as to its validity as a direction by the Executive Government to its own political officers in a foreign State, and it may be used as an example of the kind of rules by which the exercise of jurisdiction is to be governed.

The appeal from the Kathiawar Courts to the Governor of Bombay in Council might perhaps be regarded as a neutral circumstance. But the mode in which such appeals have been disposed of has been political rather than judicial. That disposal is described in a minute (dated October 11, 1877) of the then Governor of Bombay, as being "done in the Political Department of the Government itself; that is, by the Secretary to Government in that Department under the responsible supervision of the member of Council to whom . . . . the political business is assigned."

The further appeal to the Secretary of State in Council is a fact of clearer import. In Lord Salisbury's despatch of

J. C. 1905

HEMCHAND DEVCHAND v. AZAM SAKARLAL CHHOTAMLAL.

March 23, 1876, the practice of such appeals is dealt with as a thing at that date already fully established, and it continues to the present day in civil as well as in political cases. This system of appeal to the Secretary of State affords strong evidence that the intention of Government is and always has been that the jurisdiction exercised in connection with Kathiawar should be political and not judicial in its character.

What occurred in and after 1876 points to the same conclusion. In the despatch of March 23 in that year, already referred to, the Secretary of State, Lord Salisbury, suggested that an Act should be passed, general in character but intended specially for the case of Kathiawar, enabling the Governor in Council, when dealing with appeals, to refer any state of facts or law to the High Court for its opinion. The Bombay Government opposed the suggestion, and in an official letter of August 22, 1878, stated their grounds of objection. After distinguishing between "a system of government according to the will of the ruler," and "a system of government according to law," it was said: "The cases which come before this Government for adjudication are cases which have arisen in States still administered on the former principle." "Such cases can only be justly disposed of on principles of equity in the fullest sense of the term, and not in the circumscribed sense which is familiar to the practice of the High Courts; and sometimes consideration must be given to the political expediency which underlies the relation in which the Government stands to the protected States." The objections so stated prevailed. In 1879 Lord Cranbrook renewed the suggestion of his predecessor, but effect has never been given to it.

Their Lordships will humbly advise His Majesty that each of these appeals should be dismissed.

There will be no order as to the costs of these appeals.

Solicitors for appellants: *Gill, Pugh & Davey.*

Solicitors for respondents in the first appeal: *Solicitor, India Office.*

Solicitors for respondent in the second appeal: *Holman Birdwood & Co.*

[PRIVY COUNCIL.]

J. C.*
1906
Feb. 6, 9 ;
March 14.

CITY OF MONTREAL . . . . . PLAINTIFF ;

AND

CANTIN AND OTHERS . . . . . DEFENDANTS.

ON APPEAL FROM THE SUPREME COURT OF CANADA.

Quebec Act (52 *Vict. c.* 79), *ss.* 120, 144, 231—*Civil Code, Arts.* 2227, 2232 *and* 2236—*Construction—Action to recover assessed Amounts. — Assessment due on filing of the Roll.*

Under s. 231 of the City of Montreal Charter, 1889 (52 Vict. c. 79), the amount of an assessment becomes due and recoverable on the filing of the roll of assessment in the office of the city treasurer.

In an action by the city to recover after the period of prescription enacted by s. 120, calculated from the date of filing, had elapsed, it appeared that the respondent's predecessor had been a party to proceedings had for its annulment:—

Held—(1.) that the period was not interrupted thereby within the meaning of art. 2227 of the Civil Code, for there had been no acknowledgment of liability ;

(2.) That there had been no impossibility to sue within the meaning of art. 2232, for the right of action was not by the above Act suspended during such proceedings;

(3.) That the debt in suit was not dependent on a condition within the meaning of art. 2236: though s. 144 of the Act limited the time within which the roll might be annulled, it did not make the date of its coming into force conditional on the roll not being either attacked or annulled.

APPEAL by special leave from a judgment of the Supreme Court (October 31, 1904), affirming that of the Court of King's Bench (Appeal side) for the province of Quebec, which affirmed a judgment of the Superior Court.

The question decided was whether the appellant's right to recover the assessment is prescribed and extinguished by a lapse of over three years (in addition to the current year) from the date when the assessment under the roll became due and exigible, or whether the contestation of the assessment roll by any of the parties assessed on the roll, as set out in their Lordships'

* *Present:* LORD MACNAGHTEN, LORD DAVEY, LORD ROBERTSON, LORD ATKINSON, and SIR ARTHUR WILSON.

J. C. 1906

CITY OF MONTREAL v. CANTIN.

judgment, prevented the statute of prescription running in favour of the respondents.

The material articles of the Civil Code of the Province of Quebec are as follows:—

Art. 2227: "Prescription is interrupted civilly by renouncing the benefit of a period elapsed, and by any acknowledgment which the possessor or debtor makes of the right of the person against whom the prescription runs."

Art. 2232: "Prescription runs against all persons, unless they are included in some exception established by this Code, or unless it is absolutely impossible for them in law or in fact to act by themselves or to be represented by others . . . . ."

Art. 2236: "Prescription of personal actions does not run—

"With respect to debts depending on a condition, until such condition happens . . . ."

The roll of assessment was contested by various parties. The contestation to which the respondents were parties was finally disposed of in 1901. In 1902 the appellant caused their lands to be seized by the sheriff, and the respondents filed an opposition and pleaded prescription, while the appellant contended that prescription did not run during the proceedings of contestation and until the validity of the roll was established.

The Superior Court decided in favour of the respondents. Both Courts of Appeal were divided upon the point, and affirmed the decision of the first Court by a majority.

Atwater, K.C., and Ethier, K.C., for the appellant, contended that under the true construction of the city's charter (see s. 120), and in view of the admissions of liability contained in the respondents' petition to annul the roll, the period of prescription did not begin to run until the validity of the roll was established and the respondents' contestation had been finally dismissed. The object of that petition was merely to reduce the amount of the total assessment by omitting certain items of expenditure, and it was contended that, subject to this objection, the right of the appellant to recover and the obligation of the respondents to pay the amount of their assessment as ultimately established were admitted. If, therefore, the period ran from the date of the

filing of the roll, then, under arts. 2227 and 2232, it was interrupted or suspended by the proceedings of the respondents and others, which, it was submitted, in effect prevented the appellant from taking steps to enforce payment, and by the admissions contained in the petition. Under art. 2236 it was suspended until the happening of the condition on which the debt depended, that is, the establishment of the validity of the roll. Reference was made to Dalloz, jurisp. générale, 1858, 1, 413, and 1870, 1, 309; *Smith* v. *McArthur* (1); *City of Montreal* v. *Land and Loan Co.* (2); Troplong, Prescription, s. 684 (vol. 2, p. 226); Charter Act of 1899 (62 Vict. c. 58), s. 408.

Macmaster, K.C., and *W. L. Bond*, for the respondents, contended that the roll having been filed in 1895, and the first step taken to recover not having been taken till 1902, the remedy of the appellant was barred by s. 120 of the city's Charter. There was nothing to prevent an action. Such an action might have proceeded at the same time as the proceedings of contestation. Sect. 241 contemplates the recovery of assessments included in a contested roll, and directs that the amounts recovered should be applied in discharge of amounts assessed by an amended roll. The right to recover in this case is special and statutory, and unless exercised in accordance with the statute granting it, is lost. So, also, is the limitation to such right, and the plain and unambiguous terms in which such limitation is expressed cannot be controlled by articles in a general Code. Reference was made to Dalloz, 1862, 1, 35, and 1863, 1, 346; Sirey, 1879, 1, 441; and to the other articles in the Quebec Civil Code as to prescription. With regard to art. 408 of the Charter Act of 1899, it had no retroactive effect.

Atwater, K.C., replied.

1906
March 14

The judgment of their Lordships was delivered by

LORD DAVEY. In the year 1895 the city of Montreal was desirous of widening a section of Notre Dame Street, and on February 20, 1895, in accordance with the procedure prescribed by the city Charter, the Commissioners appointed for the purpose deposited in the office of the city treasurer a special roll of

(1) [1904] A. C. 389. (2) (1903) Quebec L. R. 13 K. B. 74.

J. C. 1906 CITY OF MONTREAL v. CANTIN.

assessment. One half of the cost of the improvements was thereby assessed on the proprietors of the immovables situate on each side of the street. The respondents are the representatives of a Mrs. Cantin, who was then one of the proprietors assessed, and is now deceased. On August 8, 1895, a number of interested proprietors, including Mrs. Cantin, pursuant to s. 144 of the city's Charter of 1889 (52 Vict. c. 79), filed in the Superior Court of the province a petition praying that the roll of assessment be set aside ("cassé annulé et mis à néant") on the ground of certain alleged irregularities and illegal proceedings of the Commissioners in framing it. From some cause, which does not appear on the record, delay took place in proceeding with the case, and the city did not answer or plead to the petition until October 26, 1899. Judgment was given for the city on June 29, 1900, and that judgment was confirmed by the Court of Review on June 15, 1901. On September 10, 1902, the lands of the respondents charged with the payment of the assessment were seized by the sheriff of Montreal at the instance of the appellant for the purpose of levying the amount claimed to be due from them. The respondents filed an opposition, and pleaded prescription. The only question in this appeal is whether the plea is a good one.

The appellant's Charter or Act (52 Vict. c. 79) contains the following enactments :—

Sect. 120: "The right to recover any tax, assessment, or water rate under this Act is prescribed and extinguished, unless the city within three years, in addition to the current year, to be counted from the time at which such tax, assessment or water rate became due, has commenced an action for the recovery thereof, or initiated legal proceedings for the same purpose under the provisions of this Act; and the privilege securing such tax, assessment, or water rate avails to the city, notwithstanding any lapse of time, for the recovery of any sum which may by any judgment be awarded to the city for such tax, assessment or water rate: provided that in any case any special assessment is made payable by annual instalments, the prescription runs only from the expiry of each such instalment."

Sect. 231: "The roll of assessment, when finally settled by

the Commissioners, as aforesaid, shall be filed and kept of record in the city treasurer's office ; and such special assessment shall thereupon become due and may be recovered by the corporation in the same manner as the ordinary taxes and assessments which it is authorized by this Act to impose and levy."

Sect. 241: "Whenever a roll of assessment or apportionment for any street improvement shall be annulled and set aside, the payments made under the authority of the same shall not be thereby invalidated ; but such payments, with interest added, shall go to the discharge of the respective amounts to be fixed by the new assessment roll, subject, on the part of the rate-payer, to making good any deficiency, or to receiving back any surplus, according to the difference that may eventually exist between the old and the new roll of assessment ; and the present provision shall apply as well to special assessment rolls heretofore made as to those which may be made hereafter."

In the Superior Court, Robidoux, J., held that the term for prescription ran from the filing of the special assessment roll when the special assessment became due, and that the right to recover the assessment was not suspended by the pendency of the proceedings for annulment. He therefore upheld the respondents' opposition. This judgment was affirmed by the Court of King's Bench, but two of the learned judges held that prescription had not run against the city, and concurred in the judgment affirming the Supreme Court only on the special ground that, inasmuch as another contestation of the same roll was pending at the time of seizure, the action of the city was premature, and the amount of the assessment did not become due until all the contestations of the roll had been disposed of. This judgment was again affirmed by the Supreme Court of Canada by a majority of three to two, the Chief Justice and two other learned judges holding that the city was barred by prescription, and the other two holding that the right of action was suspended during the pendency of the proceedings for annulment.

The case of the appellant was argued before their Lordships on three grounds : (1.) That there was an absolute impossibility to act within the meaning of art. 2232 of the Civil Code during the pendency of the contestation, or (in other words) the right of

J. C. 1906

CITY OF MONTREAL v. CANTIN.

action was suspended during that period; (2.) that the petition for annulment was in itself an acknowledgment by the debtor of the right of the person against whom the prescription ran within the meaning of art. 2227 of the Civil Code, and the prescription was thereby "interrupted"; (3.) that the debt was one depending on a condition within the meaning of art. 2236 of the Code, and the prescription did not run until such condition happened.

The Quebec Code incorporates in art. 2232 the well-known maxim "Contra non valentem agere non currit prescriptio." A decision of the French Court of Cassation was cited from Dalloz, that prescription did not run against a purchaser for the price of the thing purchased during the pendency of a suit to reduce the contract of sale; and another decision of the same Court was cited by the respondents to the contrary effect. The decisions of the Court of Cassation are no doubt entitled to great respect, but they are not binding authorities upon other Courts even in their own country. And their Lordships think that this case must be decided, not on conflicting decisions of a French Court, however eminent, but on consideration of the enactments in the appellant's Act or Charter. The terms of s. 231 are clear and unambiguous. The amount of the assessment became due and recoverable on the filing of the roll of assessment, and there is nothing in the Act which in terms suspends the right of action during the pendency of a contestation which, by s. 144, may be brought within six months after the passing of the assessment roll. Nor is there any obvious inconsistency in the co-existence of the right of action with the proceedings for annulment. In fact, s. 241 contemplates that payments may be validly made and received at any time before the roll is annulled and set aside, and enacts that such payments will not even in that event become returnable by the city, but may be retained and applied in or towards amounts to be fixed by a new assessment roll. And, looking at the elaborate provisions for securing publicity and opportunity for persons liable to be assessed to make objections before the final settlement of the roll contained in the earlier sections, it may well be that it was the deliberate intention of the Legislature that the amounts should be at once payable

whether there was a contestation or not. It is argued that there was an absolute impossibility in law for the city to act, because any seizure or action brought by it would or might have been stayed by injunction pending the proceedings in contestation. It is probable that the Court, in exercise of its discretion and with a view to the orderly administration of justice, would have granted such an injunction. There would then have been a real impossibility to act, but the city would have secured the benefit of its having commenced its proceeding within the prescribed delay. Or the Court might have required the respondents to submit to judgment for the amount sued for, or have imposed such other terms as the circumstances might require for the protection of the city from being prejudiced by the delay in payment. It was then argued that any action by the city to recover an assessment might have been met by a plea of lis pendens. Their Lordships think that this argument is based on a misunderstanding. The validity of the assessment could not have been tried or decided in an action by the city to recover the amount of an assessment. If the respondents relied as a defence on the invalidity of the assessment roll, their proper and only course would have been to have raised it by a cross-action or some proceeding in the nature of a counter-claim. The action of the city and the contestation of the respondents would, in fact, have stood to each other in the relation of action and cross-action, and not that of two actions raising the same issue. The plea of lis alibi pendens would not therefore be maintainable. Their Lordships are of opinion that the city's right of action was not suspended during the pendency of the contestation.

In support of the second point the appellant argued that the contestation was an acknowledgment of the appellant's right and (it is assumed) a continuous acknowledgment until the contestation was finally disposed of. The petition for annulment avers that the roll of assessment is "nul et de nul effet et doit être mis de côté," for the reasons there given, and the eighth reason ends with the conclusion that the contestants find themselves taxed "sans cause ni raison, sans considération licite et pour une cause illégale." An acknowledgment of right which

J. C. 1906 CITY OF MONTREAL v. CANTIN.

will interrupt a prescription must be something amounting to an admission of liability, and the averments in the petition, to most people, would look more like a denial and repudiation of liability.

Lastly, it was said that the debt was one depending on a condition. This argument was based on s. 144 of the Act, which provides that after the delay of six months from the passing of the assessment it shall be considered valid and binding for all purposes whatsoever, provided that the subject-matter thereof be within the competence of the corporation. The appellant construes this as meaning that the assessment shall not be valid or the amount recoverable until after such delay, and the condition which he imports into the obligation is to this effect, viz., "if the assessment shall not be attacked within six months, or if being attacked it shall be found valid." Their Lordships think that this contention is at variance with the plain provisions of ss. 231 and 241 already quoted. And they hold with Killam J. that the only effect of s. 144 is to fix a time within which an assessment may be attacked, and make it unassailable after the expiration of that time. It has nothing to do with the date on which the assessment comes into force.

Their Lordships agree with the majority of the learned judges in the Supreme Court that the prescription runs from the date on which the assessment roll was filed, and will humbly advise His Majesty that the appeal be dismissed. The appellant will pay the costs of it.

Solicitors for appellant: *Blake & Redden.*
Solicitors for respondents: *Lawrence Jones & Co.*

[PRIVY COUNCIL.]

WILLIAMS AND ANOTHER . . . . . DEFENDANTS;

AND

PERMANENT TRUSTEE COMPANY OF NEW SOUTH WALES, LIMITED, AND ANOTHER . . . . . PLAINTIFFS.

J. C.*
1906
Feb. 6;
March 14.

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

New South Wales Public Works Act, 1900, *s.* 131—*Construction.*

Held, that the prohibition in the New South Wales Public Works Act, 1900, s. 131, against the compulsory acquisition of a part only of a house or other building or manufactory where the owner is willing and able to convey the whole, applies on the true construction and intention of the Act to both methods of acquisition authorized thereby, whether by notification in the Gazette or by notice to the parties.

APPEAL from a decree of the Supreme Court (November 6, 1902), affirming a decree of the Chief Judge in Equity (September 22, 1902). The question decided was as to the construction of the New South Wales Public Works Act (No. 26 of 1900).

The Government, by notification in the Gazette of November 20, 1900, declared a small piece of land at Potts Point, Sydney, to be resumed under the Public Works Act, 1900, for the extension of a wharf. The land was before resumption vested in the respondents as trustees of the will of William McQuade, and was part of the grounds belonging to a house called Bomera, and used in connection therewith as a drying ground and laundry. On May 9, 1901, the respondents gave a notice to the Minister of Public Works as the constructing authority, that they were not willing to sell or part with the land purported to be resumed, except on the terms that the whole of the house, land and garden of Bomera should be resumed. On May 26, 1902, the respondents sued for a declaration that the Government were not entitled to resume a part,

* *Present:* The LORD CHANCELLOR, LORD MACNAGHTEN, LORD DAVEY, LORD ROBERTSON, LORD ATKINSON, and SIR ARTHUR WILSON.

J. C. 1906

WILLIAMS v. PERMANENT TRUSTEE COMPANY OF NEW SOUTH WALES, LIMITED.

and that in the event of their declining to resume the residue, the Minister of Works might be declared a trustee for them of the part resumed and ordered to reconvey it.

A decree was made by both Courts as prayed.

Wise (*K.C.* of New South Wales Bar) and *V. Hawkins*, for the appellants, contended that the decree appealed from should be reversed. The Act of 1900 consolidated two former Acts—44 Vict. No. 16 and the Public Works Act of 1888. By the former the Crown was enabled to resume lands for public purposes by a procedure materially different from that of the English Lands Clauses Consolidation Acts. By the latter (s. 19) the Government might direct that land required by the Crown for public purposes should be obtained either by resumption under 44 Vict. No. 16 or by procedure similar to the English Lands Clauses Acts as embodied in Part III. of the colonial Act of 1888. These two methods are quite distinct. The Act of 1900, Part V., treats of them in separate divisions as acquisitions respectively by Gazette notification or by notice to the parties. The present was by Gazette notification, the procedure being by ss. 36, 37, 39, and 94—97 of the Act of 1900, which are taken verbatim from Act 44 Vict. No. 16, which latter Act does not contain a provision to the effect that the whole of a tenement should be taken or none. Nor does the Act of 1888 contain such a provision so far as it is re-enacting Act 44 Vict. No. 16 in reference to acquisitions by Gazette notification. It does, however, introduce a section to that effect (s. 78) into Part III., which only applies to acquisitions by notice to the parties. In the consolidating Act of 1900, s. 78 appears as s. 131, and it was contended that it did not apply to resumptions by Gazette notification on the true construction of the meaning and intention of the Act of 1900; for that section must have the same meaning attributed to it as was conveyed by the s. 78 which it replaced. Reference was made to the cases collected in Hardcastle on Statutory Law, 3rd ed. p. 214; *Hammersmith, &c., Ry. Co.* v. *Brand* (1); *Union Steamship Co. of New Zealand* v. *Melbourne Harbour Trust Commissioners* (2);

(1) (1869) L. R. 4 H. L. 171.

(2) (1884) 9 App. Cas. 365.

Brown v. *McLachlan* (1); *Mitchell* v. *Simpson*. (2) A consolidating Act which does not profess to alter the previous Acts should have the same effect given to it as was given to those Acts for which it was substituted.

Danckwerts, K.C., and *R. J. Parker*, for the respondents, contended that on the true construction of the Act of 1900, s. 131 thereof applied to cases of resumption under that Act by notification in the Gazette. Part VIII. of that Act is headed "Provisions applicable in every case where Land is taken or acquired for authorized Works." Division 3 of that part, headed "Compulsory Purchases," includes s. 131. Therefore that section applies to the compulsory purchase in suit. The argument on the other side, moreover, erroneously assumes that s. 78 of the earlier Act applies only to resumptions by notice to the parties. Reference was made to *Arrow Shipping Co.* v. *Tyne Improvement Commissioners* (3) and *Bank of England* v. *Vagliano Brothers*. (4).

Wise, K.C., replied, referring to *In re Budgett, Cooper* v. *Adams* (5), and *R.* v. *White*. (6)

1906
March 14.

The judgment of their Lordships was delivered by

LORD MACNAGHTEN. In New South Wales the law with respect to the acquisition of land for public purposes has been consolidated by the Public Works Act, 1900, which repealed all previous legislation on the subject.

In the case of land belonging to private owners the power of acquisition by voluntary agreement is preserved. If the land is taken compulsorily, there is the choice between two methods of procedure—(1.) notification in the Gazette; and (2.) notice to the parties. It is for the governor to determine which method is to be adopted in any particular case. There is a difference as to the time when the interest of the private owner is divested, and there are some other minor differences. But the result in both cases is the same. The land is transferred from the private owner to a public authority described as "the constructing authority," and the private owner is to be compensated in

(1) (1872) L. R. 4 P. C. 543.
(2) (1890) 25 Q. B. D. 183.
(3) [1894] A. C. 508.
(4) [1891] A. C. 107, 144.
(5) [1894] 2 Ch. 557, 559.
(6) (1899) 20 N. S. W. L. R. 12, 17.

J. C. 1906

WILLIAMS v. PERMANENT TRUSTEE COMPANY OF NEW SOUTH WALES, LIMITED.

money. It is a compulsory purchase just as much in the one case as in the other.

The only question in this appeal is whether a prohibition in the Act of 1900 against taking part only of a house or other building or manufactory applies in the case where land is acquired by Gazette notification as well as in the case where land is acquired by notice to the parties.

On the face of the Act of 1900 the answer to the question seems plain enough. By s. 1 of the Act of 1900 the Act is divided into parts and divisions. Part V. contains and explains the two methods of acquiring land. Part VIII. contains provisions described as "applicable in every case where land is taken or acquired for authorized works." In that part, Division 3, headed "Compulsory Purchases," contains s. 131, which provides that "No party shall at any time be required to sell or convey to the constructing authority a part only of any house or other building or manufactory if such party is willing and able to sell and convey the whole thereof."

In their Lordships' opinion, the whole law with respect to the acquisition of lands for public purposes is now to be found in the Act of 1900, and it is not necessary or proper to resort to, or consider, the earlier legislation on the subject.

The argument on behalf of the appellants was to this effect: The Act of 1900 purports to be and is a consolidating Act; it must therefore be presumed that it was not intended to make any change in the law; originally the provision which is now s. 131 in the Act of 1900 applied only where land was taken for public purposes by notice to the parties. That was the earliest effort of legislation on the subject. It was designed to meet the wants of railways, and therefore naturally enough it was framed on the lines of the English Lands Clauses Consolidation Act, though railways in Australia, with one or two unimportant exceptions, are Government undertakings. When the simpler method of procedure by Gazette notification was introduced, and legislation on the subject took a wider range, the provision in question was omitted. This difference between the two methods was kept up in the Act of 1888, which deals with both, though the earlier legislation was not at that time repealed.

In the Act of 1900 s. 131 has got into a wrong place. You must set the matter right by re-casting the Act and re-arranging the sections.

In reference to this argument it may be observed that although the Act of 1900 is a consolidating Act and does not purport to be anything else, it is not a statute merely collecting into one chapter an original or principal Act with subsequent amendments and modifications. It involves the co-ordination (so to speak) of two different methods of procedure. It would not have been outside the scope of such an Act to bring the two methods into harmony by eliminating a difference for which no reason can be suggested. It may also be observed that it is by no means clear that the operation of the section in question was confined in the Act of 1888 to the case of taking land by notice to the parties. The better opinion seems to be that in that Act it was equally applicable to both methods of procedure. But however this may be, the Act of 1900 must, in their Lordships' opinion, be read and construed as it was enacted. The Court has no authority to take the Act to pieces and to re-arrange the sections so as to produce an effect which, on the face of the Act as it stands, does not seem to have been intended.

Their Lordships will humbly advise His Majesty that the appeal ought to be dismissed.

The appellants will pay the costs of the appeal.

Solicitor for appellants: *G. M. Light.*

Solicitors for respondents: *Goldberg, Barrett & Newall.*

[PRIVY COUNCIL.]

J. C.*
1906
Feb. 12;
March 21.

REGINALD CHARLES FRITH . . . . . DEFENDANT;

AND

JOSIAH ALEXANDER FRITH . . . . . PLAINTIFF.

ON APPEAL FROM THE COURT OF ERROR AND THE SUPREME COURT OF THE TURKS AND CAICOS ISLANDS.

Power of Attorney to possess and manage—Power not coupled with an Interest—Power held to be revocable—Contract for personal Services—Specific Performance.

In an action of ejectment the jury found that the appellant was in possession under a power of attorney for which he had given consideration other than and additional to that mentioned therein, viz., a personal guarantee to a mortgagee of the estate in suit that he would pay the mortgage debt on the day of redemption:—

Held—(1) that parol evidence of this additional consideration was admissible, for such evidence did not contradict the power;

(2.) That the power was nevertheless revocable, inasmuch as it merely appointed the appellant manager at a salary and contained no reference to any special interest created by his guarantee, and was not intended to subserve or to be dependent on the continuance of such interest;

(3.) That, assuming it to be irrevocable, he had not a good equitable defence to ejectment, since the contract with him was entire, and an inseparable part of it related to personal service. The appellant accordingly could not obtain specific performance thereof, and therefore could not obtain an injunction against an action of ejectment.

CONSOLIDATED appeals from a decree of the above Court of Error of the same islands (February 18, 1904), affirming a decree of the above Supreme Court (December 3, 1903); and from the latter decree also.

The action was one of ejectment, and the respondent's right to eject depended upon whether the power of attorney under which the appellant had obtained possession of an estate in the above-mentioned islands was revocable. It had been granted on March 12, 1902, to him by the executrix of the will of the late J. J. Frith and her sons. The former was tenant for life and the latter were remaindermen. The appellant took possession

* *Present:* EARL OF HALSBURY, LORD DAVEY, LORD ROBERTSON, LORD ATKINSON, and SIR ARTHUR WILSON.

in May of that year, and on August 18 following the grantors of the power signed a memorandum that pending the execution of a formal document they pledged themselves to retain the appellant's services as manager of the estate under the power for seven years at a salary of 60*l.* per annum. The formal document was executed on October 18, 1902, and in September, 1903, the grantors revoked the power of attorney and the managership.

The action was brought by the executrix through the respondent as her attorney. On December 3, 1903, judgment was entered for the respondent, the trial judge holding that the power was revocable. The Court of Error dismissed the appeal as having been irregularly brought before it and without hearing it on the merits. Leave to appeal was given by that Court; and subsequently special leave to appeal from the original decree was granted.

Martelli, for the appellant, contended that the power was irrevocable: see *Clifford* v. *Turrell*. (1) There was a valid agreement between him and the owners of the estate that he should have possession and management for seven years. This agreement was for valuable consideration and in order to secure him in respect of advances made and liabilities incurred by him. It was a power, therefore, coupled with an interest: see *Carmichael's Case* (2), citing *Clark* v. *Laurie* (3); *Spooner* v. *Sandilands* (4); *Smart* v. *Sandars*. (5)

Whinney, for the respondent, contended that the power was revocable. It was ancillary to the appellant's employment as manager. That employment had been terminated. The appellant could not thereafter claim to retain the estate unless he was entitled to obtain a decree for specific performance of a contract for personal services. The power was quite independent of the agreement, to which it did not refer; and would have continued after his claim was paid. Even if the power were coupled with this agreement it was still revocable, for an inseparable part of the attorney's contract was for personal

(1) (1841) 1 Y. & C. 138.
(2) [1896] 2 Ch. 643.
(3) (1857) 2 H. & N. 199.
(4) (1842) 1 Y. & C. 390.
(5) (1848) 5 C. B. 895.

J. C. 1906 FRITH v. FRITH.

services; in respect of which the only remedy was for damages see Fry on Specific Performance, 4th ed. s. 112; *Stocker* v. *Brockelbank* (1); *Johnson* v. *Shrewsbury and Birmingham Ry. Co.* (2); *Mair* v. *Himalaya Tea Co.* (3); *Ogden* v. *Fossick.* (4)

Martelli replied.

1906 *March* 21

The judgment of their Lordships was delivered by

LORD ATKINSON. The action out of which these appeals have arisen was one of ejectment, brought to recover possession of an estate called "the J. J. Frith Estate," situate at Cockburn Harbour, South Caicos, in the Turks and Caicos Islands. The plaintiff (the present respondent) sued as attorney for Elizabeth Ann Frith, the widow and executrix of J. J. Frith, deceased, the former owner, under whose will she (the widow) was tenant for life of the estate, her two sons being tenants in common in remainder. The defendant (the present appellant) had been appointed attorney over the estate by two deeds, dated respectively March 12, 1902, and October 18, 1902, executed by the executrix and her said two sons, and authorizing him to enter into possession of and manage the estate, to receive the rents and profits thereof, and thereout, after providing for the expenses of management, pay the debts due by the owners of the estate. In the month of May, 1902, the appellant entered into possession as such attorney. In the month of September, 1903, notice was served upon him by the widow and the sons purporting to revoke his appointment. Shortly afterwards possession was demanded from him on behalf of the widow, but was refused by him on the ground that, owing to a personal guarantee which he, with the widow's consent, had given to one W. B. Astwood, a mortgagee of the estate, to pay the mortgage debt on the day of redemption, his authority was coupled with an interest, and was, therefore, irrevocable. The deeds of March 12 and October 18, 1902, do not contain any reference to this guarantee or to the mortgage debt, and did not create any charge or lien in favour of Astwood or any other creditor of the owners of the estate, or form part of Astwood's security. And though by the

(1) (1851) 20 L. J. (Ch.) 401.
(2) (1853) 3 D. M. & G. 914.
(3) (1865) L. R. 1 Eq. 411.
(4) (1862) 4 D. F. & J. 426.

payment of the latter's debt the special interest which was to keep alive the appellant's authority would have ceased to exist, his continuance in his post is not made to depend in any way on that event. It was alleged that the appellant had, before March 12, 1902, the date of the first deed, given security to another creditor, Messrs. Middleton & Co., of New York, but inasmuch as before it was attempted to revoke the appellant's authority, and necessarily before possession was demanded, the full amount due to this firm had been tendered to them, it was conceded in argument that nothing turned upon this transaction, and that, as far as these appeals are concerned, it might be dismissed from consideration.

At the trial, which took place before St. Aubyn J. and a special jury of the island, there was no substantial conflict of evidence. The main facts of the case were in effect admitted. The appellant, however, tendered evidence to shew that the deed of October 18, 1902, did not disclose the entire consideration given for it, and that additional consideration for it had moved from the appellant, namely, the above-mentioned personal guarantee given by him to Astwood with the approval of the widow, without which it was clearly established that Astwood would not have advanced the money. The learned judge at first, apparently, thought this evidence was inadmissible, on the ground that it would contradict the deed; but subsequently he admitted it. At the close of the defendant's case he expressed the opinion that the main question at issue, namely, whether the power of attorney were revocable or not, was purely a question of law for his own decision; but at the instance of the appellant's advocate he submitted to the jury eight somewhat involved and complicated questions. Of these three only, namely, Nos. 2, 3, and 8, seem to be of any importance. The answers to these appear, when taken together, to amount, in effect, to a finding that there was consideration for the deed of October 18, 1902, other than, and additional to, that mentioned in it, namely, the agreement between the widow and the appellant that the latter should give to Astwood the above-mentioned personal guarantee, as he subsequently did.

On these findings the appellant's advocate moved for judgment,

J. C
1906
FRITH
v.
FRITH.

but St. Aubyn J., on December 3, 1903, delivered the judgment of the Supreme Court in favour of the respondent, holding that the parol evidence tendered to prove the additional consideration was inadmissible on the ground that it contradicted the deed, and that the authority given to the appellant as attorney was revocable.

From this decision the appellant appealed to the Court of Error of the islands. That tribunal held that the appellant had not taken the necessary steps to bring his appeal before them; that the appeal was in fact not properly before them at all; and they dismissed it with costs. From this decision the appellant obtained leave to appeal to His Majesty in Council in the usual way. The record of the proceedings does not shew what were the particular rules of practice which the appellant was considered to have violated or failed to observe, and as the proceedings of the Court of Error appear to have been somewhat irregular, special leave was given to the appellant to appeal from the decision of the Supreme Court direct to His Majesty in Council, in addition to the leave to appeal obtained by him from the Court of Error itself.

The appellant's counsel on the hearing of these appeals contended in effect:—

(1.) That St. Aubyn J. was wrong in holding that the parol evidence of the additional consideration was inadmissible.

(2.) That the authority given to the appellant by the two instruments of March 12 and October 18, 1902, was, having regard to the findings of the jury in reference to the guarantee, an authority coupled with an interest, and therefore irrevocable.

(3.) That the attempt to revoke the authority and to dismiss and dispossess the appellant before the seven years for which he was appointed had expired was so inequitable that the respondent should be restrained by injunction from carrying it out, and that therefore the appellant had a good equitable defence to the ejectment.

These are in effect the questions for their Lordships' decision.

In support of the first contention the case of *Clifford* v. *Turrell* (1), which was a suit for specific performance, was cited.

(1) 1 Y. & C. 138.

The plaintiff in that case was the lessee of a farm the stock and farming implements upon which had at the suit of the defendant been taken in execution. The plaintiff, with the consent of the sheriff, executed a deed by which he purported to assign to the defendant, for a money consideration exceeding the amount of the execution, the chattels seized, and, it was contended, his interest in the leasehold. Parol evidence was admitted to prove that additional consideration was in fact given for the deed by which the plaintiff was induced to execute it, namely, an agreement by the defendant that he would pay to the plaintiff an annuity of 40*l.* per annum during his life and give to him a house worth 10*l.* a year to live in. Specific performance of that parol agreement was decreed. The Vice-Chancellor (Sir L. Shadwell) in delivering judgment in the case, lays down, in the opinion of their Lordships correctly, the rule of law upon this subject. He said:

"Rules of law may exclude parol evidence where a written instrument stands in competition with it, but it has long been settled that it is not within any rule of this nature to adduce evidence of a consideration additional to what is stated in a written instrument."

And then adds:

"The rule is, that where there is one consideration stated in the deed, you may prove any other consideration which existed, not in contradiction to the instrument; and it is not in contradiction to the instrument to prove a larger consideration than that which is stated."

Their Lordships think the present case comes within that rule, that the evidence proposed to be given did not contradict the deed, and that the appellant's first contention is well founded.

In reference to the second point, it cannot be disputed that the general rule of law is that employment of the general character of the appellant's in this case can be terminated at the will of the employer. The proper conduct of the affairs of life necessitates that this should be so. The exception to this rule within which the appellant must bring himself, if he is to succeed, is that where "an agreement is entered into for sufficient consideration, and either forms part of a security, or

J. C. 1906 FRITH v. FRITH.

is given for the purpose of securing some benefit to the donee of the authority, such authority is irrevocable": Story on Agency, sect. 476.

It cannot be contended that the ordinary case of an agent or manager employed for pecuniary reward in the shape of a fixed salary comes within this exception, though his employment confers a benefit upon him. And their Lordships are of opinion that the position of the appellant under the instruments appointing him attorney over this estate is in law that of an ordinary agent or manager employed at a salary, and nothing more, because the authority which was conferred upon him contains no reference to the special interest in the occupation of his post which his guarantee to Astwood might have given him, was not expressed or intended to be used for the purpose of subserving that interest, and has no connection with it. For these reasons their Lordships think that the authority given to the appellant was revocable. Several cases have been cited by the appellant's counsel in support of his second contention. On an examination of them it will be found that the essential distinction between this case and those cited is this, that in each of the latter power and authority were given to a particular individual to do a particular thing, the doing of which conferred a benefit upon him, the authority ceasing when the benefit was reaped, while in this case, as already pointed out, nothing of that kind was ever provided for or contemplated. In *Carmichael's Case* (1) the donor of the power, for valuable consideration, conferred upon the donee authority to do a particular thing in which the latter had an interest, namely, to apply for the shares of the company which the donee was promoting for the purpose of purchasing his own property from him, and the donor sought to revoke that authority before the benefit was reaped. In *Spooner* v. *Sandilands* (2) the donor charged his lands with certain debts due and to accrue due to the donees, and put the latter into the possession of those lands and into receipt of the rents and profits of them, for the express purpose of enabling the donees to discharge thereout these same debts; and it was sought to eject the donees before their debts were paid.

(1) [1896] 2 Ch. 643. (2) 1 Y. & C. 390.

In *Clerk* v. *Laurie* (1) a wife pledged to a bank dividends to which she was entitled to secure advances made to her husband. It was held that while the advances remained unpaid, she could not revoke the bank's authority to receive the dividends. In *Smart* v. *Sandars* (2) it was decided that the general authority of a factor in whose hands goods were placed for sale, to sell at the best price which could reasonably be obtained, could not be revoked after the factor had made advances on the security of the goods to the owner of them, and while these advances remained unpaid. It is not necessary for the purposes of these appeals that their Lordships should determine whether or not the appellant has, on the authority of *Read* v. *Anderson* (3) and *Turner* v. *Goldsmith* (4), a right of action against the respondent for damages for breach of agreement. However that may be, it is clear, their Lordships think, that even if the authority conferred upon the appellant had been irrevocable, he has not a good equitable defence to the action of ejectment, inasmuch as the contract made with him being one entire thing incapable of being divided into independent parts, he would not, upon the authorities cited, be entitled to an injunction to restrain the respondent from suing in ejectment. That is, as the appellant's counsel admits, the test. A suit for such an injunction would, in this case, amount in effect to a suit for specific performance of a contract for hiring and service, a suit which cannot be maintained. In *Ogden* v. *Fossick* (5) the suit was instituted for specific performance of an agreement to grant a lease of a coal wharf. The agreement contained a provision that the plaintiff should, during the term, be appointed manager of the coal wharf at a specified salary. It was held by the Lords Justices that the two parts of the agreement were inseparably connected, and as a decree for specific performance of the contract for personal service could not be granted, the suit must be dismissed. In *Stocker* v. *Brockelbank* (6) the plaintiff, who was entitled to certain letters patent, by deed granted to the defendant for a money consideration an exclusive licence to use the patent, and by the

(1) 2 H. & N. 199.
(2) 5 C. B. 895.
(3) (1884) 13 Q. B. D. 779.
(4) [1891] 1 Q. B. 544.
(5) 4 D. F. & J. 426.
(6) 20 L. J. (Ch.) 401.

J. C. 1906 FRITH v. FRITH.

same deed covenanted with the plaintiff that he (the plaintiff) should act as manager of the defendant's works for the same period. The plaintiff was dismissed. He thereupon filed a bill claiming to be a partner in the business, and praying that the defendant might be restrained from excluding him from the works. In delivering judgment the Lord Chancellor (Lord Truro) said :

"I therefore am clearly of opinion that . . . . there was no partnership, that it was simply a contract of hiring and of service, the remuneration to be measured with reference to the amount of the profits of the business. If that be so, is there any instance . . . . where it has been supposed that a contract of hiring and service could be made the subject of an application to this Court if the employer claimed . . . . to dismiss his servant, or his manager, or by whatever name the party to perform the service is to be denominated ? I do not recollect any instance of any attempt on the part of a Court of Equity to compel the employer to retain the servant, agent, or manager, and not to forbear to leave him to his remedy at law for the breach of it."

Their Lordships are accordingly of opinion that the appellant's third contention, like his second, cannot be sustained, and that the appellant is not entitled to withhold from the executrix the possession of the lands which he obtained as her and her sons' attorney or agent.

Their Lordships will therefore humbly advise His Majesty that both these appeals should be dismissed. The appellant must pay the costs of them.

Solicitors for appellant: *Burgess, Cosens & Co.*
Solicitor for respondent: *John Fawcett.*

[HOUSE OF LORDS.]

MAYOR, &c., OF LONDON . . . . . APPELLANTS;

AND

NETHERLANDS STEAMBOAT COMPANY . RESPONDENTS.

H. L. (E.) 1905 Aug. 3.

Rates—Assessments—Composition in lieu of Rates—Statutory Exemption—52 Geo. 3, c. 49, ss. 3, 5—2 & 3 Will. 4, c. 66, ss. 2, 3—City of London Sewers Act, 1848 (11 & 12 *Vict. c.* clxiii.), *s.* 169.

A statute of 1812 enacted that a fixed composition in lieu of rates which had been voluntarily paid by the Treasury in respect of Crown property in the City of London should be paid every year for ever out of the consolidated customs to the rate collectors, and that the premises should be exempt from all rates and assessments though they might become private property. A statute of 1832 repealed so much of the Act of 1812 as made the composition payable out of the consolidated customs, and enacted that the collectors should collect the composition, and no more, from the occupiers of the property, which was about to be sold by the Treasury. The premises having become private property, the occupiers were assessed to rates under the City of London Sewers Act, 1848:—

Held, affirming the decision of the Court of Appeal, that upon the true construction of the arrangement made in the statutes of 1812 and 1832 the exemption applied to future as well as existing rates and assessments, and that it was not affected by the City of London Sewers Act, 1848.

IN 1902 a consolidated rate and a sewer rate were made under the City of London Sewers Act, 1848, and other Acts in respect of premises occupied by the respondents in Lower Thames Street, in the City, and described in the rate as "Custom House and Wool Quays."

In 1812 the 52 Geo. 3, c. 49 was passed, and by s. 1 the period within which the Commissioners of the Treasury were required by a previous Act to purchase the "Legal Quays" and other premises in the port of London was extended. By s. 2, after reciting that the Custom House and premises in the port of London were in a ruinous state, and that it was necessary to erect a new Custom House in the City, and for that purpose to purchase certain premises in Lower Thames Street, in the parish of St. Dunstans in the East, provision was made for the purchase.

Sect. 3 ran thus: "And whereas the sum of 220*l.* 12*s.* 10½*d.* is

H. L. (E.) 1905 — LONDON CORPORATION v. NETHERLANDS STEAMBOAT COMPANY

annually paid by the direction of the Lords Commissioners o His Majesty's Treasury in respect of the present Custom House and other premises contiguous to or connected therewith which by law are not rateable, and another sum amounting to 220*l.* 12*s.* 10½*d.* is legally payable and paid as rates in respect of the Legal Quays in front of the said Custom House and premises aforesaid, to the respective collectors of the parochial and ward rates and assessments in the said ward of Tower, and in the parish of Allhallows, Barking, within the said ward, and it is expedient that the payment of the same respective annual sums should be continued; be it therefore further enacted that the respective annual sums now paid as aforesaid shall yearly and every year for ever hereafter be paid out of consolidated customs to the respective collectors for the time being of the rates and assessments to whom the same respectively are now paid without any deduction or abatement whatever, in the same parts, shares, and proportions, on or at the same days or times, and in the same manner as the other rates or assessments of the said ward and parish respectively shall for the time being be paid, and shall be considered as part of the produce thereof."

Sect. 4 dealt with the premises in Lower Thames Street mentioned in s. 2 as required for the new Custom House, and with a sum of 816*l.* 7*s.* 5*d.* to be paid out of consolidated customs in lieu of the rates which would be lost by those premises becoming Crown property.

Sect. 5: "And whereas the present Custom House being public property, is by law exempt from the payment of all rates and assessments and the said premises in Lower Thames Street about to be purchased under and by virtue of this Act will be when the same shall so become public property also exempt from the payment of all rates and assessments; be it further enacted that from and after the said 5th day of April the said present Custom House, and after the completion of the purchase thereof the said premises in Lower Thames Street, shall be and be deemed and considered to be, to all intents and purposes, free and exempt from the payment of all and all manner of rates and assessments, although the same and each and every of the said premises may become private property by the sale or assignment thereof to

individuals, any law, usage or custom to the contrary notwithstanding."

In 1832, 2 & 3 Will. 4, c. 66, was passed. Sect. 1, after reciting that the Legal Quays and other premises had been purchased by the Treasury Commissioners, gave the Commissioners power to convey the Legal Quays and premises to purchasers.

Sect. 2 recited s. 3 of the 52 Geo. 3, c. 49, and enacted that after the sale and conveyance by the Treasury of the quays known by the name of Custom House and Wool Quays and other premises, in respect of which, or parts of which, the two sums of 220*l.* 12*s.* 10½*d.* were payable, so much of the 52 Geo. 3, c. 49, as directed payment of those two sums out of the consolidated customs should be repealed.

Sect. 3 enacted that the collectors of those two sums should collect "the same and no more" from the occupiers of the premises for the time being.

Part of the premises in respect of which the respondents were assessed and rated was upon the site of the old Custom House and the buildings contiguous thereto, and upon the site of the "Legal Quays." The premises were sold by the Treasury Commissioners in 1835, and in 1902 were in the occupation of the respondents. The respondents contended that, by reason of the 52 Geo. 3, c. 49, and 2 & 3 Will. 4, c. 66, no part of the premises which they occupied was rateable, and a special case was stated at quarter sessions raising this point. The King's Bench Division (Lord Alverstone C.J., Wills and Channell JJ.) affirmed the rate. This decision was reversed in part by the Court of Appeal (Collins M.R., Romer and Mathew L.JJ.), who held that, as to that part of the premises in respect of which the two sums of 220*l.* 12*s.* 10½*d.* were payable, the respondents were not liable to be assessed. The present appeal by the London Corporation related only to the part which was declared exempt by the Court of Appeal.

May 18, 19. *Danckwerts, K.C.*, and *Cave, K.C.* (*R. Cunningham Glen* with them), for the appellants. The exemption from rateability conferred by s. 5 of the Act of 1812 related only to the rates existing at that time and in respect of which the two

H. L. (E.) 1905 LONDON CORPORATION v. NETHERLANDS STEAMBOAT COMPANY.

sums of 220*l.* 12*s.* 10½*d.* were payable as compositions. The Act of 1832 must bear a similar restriction. Therefore there is no exemption as to future rates, such as the consolidated rate and the sewer rate, which were not contemplated in 1812 or 1832, and were not imposed till long after. The City of London Sewers Act, 1848, imposes those rates by s. 169 upon every person occupying any house or building within the City, "whether such person shall be now liable in respect of such house or building to be assessed to the relief of the poor, or be not liable to be assessed to the relief of the poor in respect thereof by reason of such house or building being situated in any precinct or extra-parochial place or otherwise." The rates on which the commutation was granted in 1812 were payable only by persons liable for poor rates, but the Act of 1848 imposes the two new rates expressly upon all persons whether liable or not for poor rates. And s. 187 shews the intention to rate even Crown property, prisons and public buildings being made rateable. Therefore any exemption granted in 1812 or 1832 was taken away in 1848. [They cited *Sion College* v. *London Corporation* (1) and the cases there referred to.]

Macmorran, K.C., and *Avory, K.C.* (*Roskill, K.C.*, with them), for the respondents. The exemption granted by the Acts of 1812 and 1832 is expressed in plain language. It is difficult to suppose that the composition paid in lieu of rates was to be for all time and yet the exemption from rates was to expire. The statutes were a compromise, and part of the bargain was that the premises were to be free from rates for as long as the compositions were to be paid, that is, for ever. This case turns on the special words of the statutes, and not upon the authority of other and differently worded statutes.

Danckwerts, K.C., in reply. The compositions having been calculated only upon the rates leviable in 1812 and not upon future rates, the exemption ought to be construed as applying only to the rates existing in 1812.

The House took time for consideration.

[1901] 1 K. B. 617.

Aug. 3. EARL OF HALSBURY L.C. My Lords, in the year 1812 the Government was minded to build a new Custom House, the old one being decayed and unfit for its purpose. In order to do this they pulled down the old Custom House and, under an Act of Parliament, had power to purchase more land for the same purpose. The old Custom House, as it then existed, was not liable to rates at all, as it was Crown property; but the other land about to be purchased by the Government was rateable. The Government, however, in view of the hardship upon the ratepayers in the district within which the Custom House was situated, voluntarily paid the sum of 220*l.* 12*s.* 10½*d.* every year in respect of the then existing Custom House and other premises contiguous to or connected therewith. Another sum of the same amount was legally payable in respect of the Legal Quays. It was enacted, therefore, that the said respective annual sums should yearly, and every year for ever thereafter, be paid to the respective collectors for the time being of the rates and assessments to whom the same respectively were then paid, without any abatement or deduction.

A specific section then was passed with a view to relieving the ratepayers when certain houses and other buildings became vested in the Crown for public purposes. The Act recites that it is not consistent with equity that an additional burden should be imposed on the parishes in consequence of the premises being so conveyed to the Crown, and it enacts that the sum of 816*l.* 7*s.* 5*d.* should be paid every year for ever hereafter, and it accounts for the selection of that sum as what was to be paid hereafter for ever, because it was the sum of what was assessed as the parochial and ward assessment according to the last assessment made before the passing of the Act.

It will be observed that there were to be perpetual payments every year in lieu of rates, and as a corollary another section declares that after a certain day the then present Custom House, and after the completion of the purchase thereof the premises in Lower Thames Street, should be deemed and considered free and exempt from the payment of all manner of rates and assessments, although the same and each of them might become private property by the assignment thereof to individuals.

H. L (E.) 1905

LONDON CORPORATION v. NETHERLANDS STEAMBOAT COMPANY.

Earl of Halsbury L.C.

Surely, if the payment was to be perpetual, so was the immunity from rates.

In 1832 another Act was passed enabling the Government to transfer to private purchasers the property in question, and the liability to make the payments, which while the Crown were the owners were paid by the Crown. The result of this arrangement, made under the authority of a statute (obviously intended, and, I think, in sufficiently plain language enacted) was to make the premises in question rate free for all time. One does not understand what could be the object of the whole arrangement, including a commuted sum to be payable for all time, if the land was still to be liable to have fresh rates assessed upon it.

The Acts to which I have referred are essentially public Acts: they deal with public rights and involve the rights of the Crown. I think it is hopeless to contend that the Sewers Act of 1848 took away the privilege thus granted. It is needless to point out that the Crown must have obtained considerably larger sums for the property they sold because it was rate free, and it certainly would be somewhat strange if another Act of Parliament, and that a private one, should have taken away the privileges thus purchased.

As to the case of Sion College, the circumstances and the language construed in that case are entirely different. I think the judgment of the Court of Appeal was right, and that this appeal should be dismissed with costs.

LORD DAVEY. My Lords, a great many authorities have been referred to in the course of the argument, and, so far as they lay down general principles applicable to the construction of statutory enactments exempting particular persons from the payment of rates, they may be usefully consulted. But for the most part the cases referred to related to the construction of private agreements between landlord and tenant as to the incidence of public burdens on the land demised as between themselves, and to the construction of other Acts of Parliament expressed in different language. Cases of that description will not, I think, afford much assistance to your Lordships. Ultimately the opinion of

your Lordships must be formed on the language and effect of the particular enactments now in question.

I confess I am somewhat surprised to hear the Act of 52 Geo. 3 (1812) and the subsequent Act of 1832 described as local and personal Acts. The Act of 1812 must have been brought in and promoted by the Treasury on behalf of the Crown, and the effect was to authorize the application of public moneys in the purchase of a site for the erection of a new Custom House, and also to impose a large annual charge on the consolidated customs, which were part of the public revenue. According to constitutional usage, such purposes could only be effected by a public Act, and I think that the Acts both of 1812 and of 1832 ought to be treated as public Acts.

There are three separate properties referred to in the Act of 1812, viz.: (1.) The site of the old Custom House, which was about to be pulled down; (2.) houses and buildings in Lower Thames Street, which the Treasury was empowered to purchase as a site for a new Custom House; (3.) Lands called "Legal Quays," lying between the old Custom House and the river, which were also then in private ownership, but about to be purchased by the Treasury. The bargain or arrangement between the Treasury and the local rating authorities (the Tower Ward and the parish of Allhallows, Barking), which was carried into effect by the Act, was that the Treasury should out of the consolidated customs continue to pay an annual sum of 220*l.* 12*s.* 10½*d.*, which had theretofore been voluntarily paid to the collectors of rates in respect of the old Custom House, and also a sum of the same amount which had been paid for the rates on the "Legal Quays," and should pay an annual sum of 816*l.* 7*s.* 5*d.*, being the amount of the parochial and ward rates on certain other premises in Lower Thames Street, according to the last assessment. On the other hand, the old Custom House and, after the purchase thereof, the premises in Lower Thames Street were declared to be free and exempt "from all and all manner of rates and assessments, although the same might become private property by the sale or assignment thereof to individuals, any law, usage, or custom to the contrary notwithstanding."

By the 2nd section of the Act of 1832 it was enacted that

H. L. (E.) 1905 LONDON CORPORATION v. NETHERLANDS STEAMBOAT COMPANY. Lord Davey.

after the conveyance and assurance by the Treasury of certain quays, warehouses, and other buildings, in respect of which, or some part or parts thereof, the two sums of 220*l.* 12*s.* 10½*d.* and 220*l.* 12*s.* 10½*d.* were payable, the direction in the Act of 1812 for payment of those sums out of the consolidated customs should be repealed, and by the 3rd section the collectors of the said two sums were empowered to collect the same, and no more, from the occupiers of the said premises for the time being.

Your Lordships will have observed that there is no express exemption of the "Legal Quays" in the Act of 1812 from rates and assessments when they should again come into private ownership. But I agree with the learned judges in the Court of Appeal that they are treated as becoming when purchased in the same position as the site of the old Custom House to which they were contiguous, and that the effect of the Act of 1832 is to make the payment of the sum of 220*l.* 12*s.* 10½*d.* in respect of them perpetual, though no longer out of the consolidated customs, and to extend to the "Legal Quays" the same exemption as attached to the site of the old Custom House.

My Lords, the provisions of these Acts appear to me to differ from all the Acts of Parliament referred to in the previous cases, inasmuch as a composition was made payable in respect of the rates on the premises in question, and the Crown, by assuming a statutory liability for payment of the composition out of the public revenue, gave a valuable consideration for the exemption of the premises from rates after they should come into private ownership; and I agree with the learned judges in thinking that difference a vital one for the present purpose. It may be assumed that the sum of 220*l.* odd was fixed with reference to the amount which would have been payable if the premises had not been Crown property. But there is nothing in the Act which shews how the sum was made up, or in what proportions it was then divisible between the ward rates and the parochial rates. The provision at the end of s. 3 of the Act of 1812 directs only that the division should be made in whatever proportion might for the time being be proper. This would, of course, be easily done by taking the rate per pound of the respective assessments. It does not appear to me to contain any reference

to existing rates or to assist the appellant's argument. I am of opinion that, according to the true construction of s. 5 of the Act of 1812, and s. 3 of the Act of 1832, the respondents are exempted from payment of the consolidated rate made by the appellants in respect of the premises comprised within the sites of the old Custom House and Legal Quays. And I do not think that such exemption is taken away by s. 169 of the City of London Sewers Act, 1848. The words in that section appear to me to be directed to the case of a person claiming exemption by reason of his not being liable to be assessed to the relief of the poor in respect of his premises, and were probably inserted to meet the decision in *Eddington* v. *Borman*. (1) But in this case the respondents claim exemption, not because they are exempted from poor rates, but because they are exempted by the statutes from all manner of rates. I am also of opinion that the language of the 169th section is not sufficiently explicit to repeal by implication an express statutory exemption in the earlier Acts, and ought not to be so construed.

I am of opinion that the appeal should be dismissed with costs.

Lord James. My Lords, in order to make clear the questions involved in this case it is necessary to consider the condition of certain property immediately prior to the passing of the Act of 1812.

At that time the Custom House, situated in Lower Thames Street, was in a very dilapidated condition. In front of it were certain quays called "Legal Quays," and it was contemplated to pull down the old Custom House and to purchase under compulsory powers certain other land, situated in Lower Thames Street, for the purpose of building thereon another Custom House. The site of the Legal Quays at this time was not vested in the Crown.

The old Custom House, being vested in the Crown, was not liable to be rated, but the Legal Quays, not being so vested, were liable. Certain payments in lieu of rates were made by the Crown as shewn by recitals in the Act of 1812. [His Lordship read the sections.]

If the legislation on the subject had been confined to the Act

(1) (1790) 4 T. R. 4.

H. L. (E.) 1905

LONDON CORPORATION v. NETHERLANDS STEAMBOAT COMPANY.

Lord James

of 1812, I think considerable doubt would exist whether the Legal Quays were included in the land and premises exempted from rateability; but a second statute, 2 & 3 Will. 4, c. 66, was passed for the purpose of transferring to private purchasers of these lands and premises the liability to pay the sums undertaken to be paid by the Crown whilst they were the owners of them. And it seems to me that the recitals and enactments in ss. 2 and 3 of that Act made it clear that the Legal Quays were intended to be dealt with in like manner as the site of the Custom House.

This being so, I think that the whole of the land and premises in question now in the hands of purchasers are free from the payment of rates and liable only to payment of the commuted sums.

I agree with the Master of the Rolls when he says that the composition was made in respect of all time thereafter. The statutes do not refer to then existing rates, but apparently all future rates were contemplated. The words "for ever" appear to be employed for the purpose of shewing that this bargain was to be taken on both sides for better or worse, and that the property should in the hands of private owners be as free from rateability as if it had been occupied by the Crown.

The case of Sion College was pressed strongly upon your Lordships' consideration in support of the appellants' case. In that case it was held that a provision in an Act of Parliament that certain land should vest in adjoining owners "free from all taxes and assessments whatsoever" applied only to then existing assessments, and this decision was founded on the authority of several cases which held that prima facie a statutory exemption from rateability referred only to rates and assessments existing at the time of the making of the commutation. But every case must depend upon the words creating what I will call the contract of exemption, and in the present case I find words in the statutes shewing that the future as well as the then present rates were intended to be dealt with, words which are absent from the statute controlling the non-rateability of Sion College.

I cannot give effect to the argument that the method of

collecting rates is changed, and that there will be difficulty in finding the proper collector to receive the commuted sum. Some method must be found—even by legislation, if necessary—for overcoming such difficulties, if they exist. If the Legislature has freed these properties from payment of rates, their owners who have acquired and paid for the properties so freed are not to be deprived of their legal right in consequence of the existence of a difficulty not in any way created by them.

I also concur in the view that the exemption thus created is not taken away by the provisions of the Sewers Act of 1848.

I therefore think that this appeal should be dismissed with costs.

Lord Robertson. My Lords, I concur.

Order of the Court of Appeal affirmed, and appeal dismissed with costs.

Lords' Journals, August 3, 1905.

Solicitors: *Sir Homewood Crawford; Pritchard & Sons.*

[HOUSE OF LORDS.]

H. L. (E.) 1905 Nov. 23.

WILLIAM CORY & SON, LIMITED . . . . Appellants;

AND

C. W. HARRISON and Others . . . . . Respondents.

Restraint of Trade—Covenant—Breach—Agreement by Vendor of Business not to "carry on or be concerned or interested in" a similar Business—Sale on Credit.

The respondent, a coal merchant carrying on both a home and an export business, sold the home business to the appellants and covenanted with them that he would not "solely or jointly with any other person either directly or indirectly carry on or be concerned or interested in the coal trade in any part of Great Britain or the Isle of Man." He afterwards sold the export business to a company and took the purchase-money in shares. The company afterwards sold the export business to a firm, the purchase-money being payable to the company by instalments lasting over several years. The firm having begun to carry on both a home and an export business, the appellants brought an action against the respondent for breach of covenant:—

Held, that the respondent was not "concerned or interested in" the home business in the business sense which must be attributed to those words, and that there was no breach of covenant.

In 1896 the respondent, C. W. Harrison, a coal merchant carrying on both a home business and an export business, sold the home business to the appellants and covenanted that he would not solely or jointly with any other person either directly or indirectly carry on or be engaged or concerned or interested in the coal trade in any part of Great Britain or the Isle of Man. In 1898 C. W. Harrison sold his export business to the company of J. & C. Harrison, Limited, receiving the purchase-money in shares. That company in 1901 sold its business to John Harrison & Tidswell. The purchase-money of this last sale was a large sum, payable by instalments lasting over a considerable number of years. John Harrison & Tidswell afterwards began to carry on a home business as well as an export business in the coal trade, and the appellants brought an action against C. W. Harrison and others, claiming an injunction and damages. The action was dismissed by Joyce J. on the

authority of *Smith* v. *Hancock* (1), and this decision was affirmed by the Court of Appeal (Vaughan Williams, Stirling, and Cozens-Hardy L.JJ.).

Warmington, *K.C.*, and *Haldane*, *K.C.* (*Austen-Cartmell* with them), for the appellants. The mere sale of the export business was not a breach of the covenant, but when John Harrison & Tidswell began to carry on a home business there was a breach, because C. W. Harrison could only look to be paid out of the proceeds of the trade, both home and export, which John Harrison & Tidswell were carrying on. He was therefore "concerned and interested in" in the coal trade within the meaning of the covenant. He was not a partner, it is true, with John Harrison & Tidswell, but he was certainly, as a large shareholder in J. & C. Harrison, Limited, indirectly, if not directly, interested in the home and foreign profits of John Harrison & Tidswell for payment of the price of the export business sold by him to J. & C. Harrison, Limited. *Smith* v. *Hancock* (1) is clearly distinguishable. There the covenantor took no part in the business which was alleged to be a breach of the covenant, found no money for it, drew no money out of it, had no share in its profits. The case here is very different. C. W. Harrison has all the interest which a vendor on credit cannot help having in the prohibited business; on its success depends the value of his shares.

Neville, *K.C.*, *Hughes*, *K.C.*, and *Sheldon*, for the respondent, were not heard.

EARL OF HALSBURY L.C. My Lords, we are all of opinion that what is complained of here is not within the covenant. It would be absolutely impossible, I think, to lay down with precision what is or is not comprehended in such words as "interested or concerned in." You must look at the facts of the particular case and look at the business meaning of the words. That is the question to be determined, What was the business meaning of these words, dealing with such

(1) [1894] 2 Ch. 377.

H. L. (E.) 1905

WILLIAM CORY & SON, LIMITED v. HARRISON.

Earl of Halsbury L.C.

a subject-matter as is dealt with by these agreements? To my mind it is impossible to say that the words of the covenant make this gentleman "concerned or interested in" this particular business.

The ambiguity arises when words so very wide in their extension are applied to a business of this character. The words "concerned or interested in" would, in popular signification, undoubtedly include a great deal more than could have been intended by the business meaning of this covenant. When it is put that you are interested if you lend money to a person, if you supply him with capital, if you do this, that, and the other which enables a business to be carried on, in a certain wide sense it cannot be denied that you are "interested"; and "being interested" might include the fact that you are on affectionate terms with the person carrying on the business. But when you are dealing with the carrying on of a business and endeavouring to prevent the carrying on of that business directly or indirectly, or the having any part or concern in that business, I think every business man would quite comprehend that the mere fact of being a creditor of the firm is not being "concerned or interested in" it. Although, in a certain sense, every creditor is interested in the solvency of his debtor, and in that sense there is an interest, that is not the sort of interest that is contemplated by this covenant. It appears to me that that is really the short point we have to decide, and, as far as I am concerned, I think there is no doubt that it is not within the covenant.

For these reasons I am of opinion that this appeal should be dismissed with costs.

LORD ROBERTSON. My Lords, I am of the same opinion. I think the case of the appellants is untenable, and I am quite content to face the challenge which was made by the learned counsel for the appellants to treat this from a business point of view. It seems to me that to apply the word "interested" in this sense would be to give it an extension which would prove most embarrassing, and indeed impracticable, in the ordinary conduct of business.

LORD LINDLEY. My Lords, I am entirely of the same opinion, and I cannot usefully add anything to the reasons that have been given.

Order of the Court of Appeal affirmed and appeal dismissed with costs.

Lords' Journals, November 23, 1905.

Solicitors: *Deacon, Gibson, Medcalf & Marriott: Keene, Marsland, Bryden & Besant.*

[HOUSE OF LORDS.]

MANCHESTER CARRIAGE AND TRAMWAYS COMPANY, LIMITED . . . . . } APPELLANTS;

AND

SWINTON AND PENDLEBURY URBAN DISTRICT COUNCIL . . . . . } RESPONDENTS.

Tramway—Local Authority—Sale of Tramways within a District—Payment by Local Authority for Buildings outside the District—Tramways Act, 1870 (33 & 34 *Vict. c.* 78), *s.* 43.

Where in pursuance of s. 43 of the Tramways Act, 1870, the local authority require the promoters of a tramway in any district to sell so much of the tramway works and undertaking as is within the district, the payment by the local authority to the promoters must include the value of buildings of the promoters, which, though situated outside the district, are suitable to and used by the promoters for the purposes of their undertaking within the district.

THE question arising in this appeal turned upon the construction of s. 43 of the Tramways Act, 1870. By that section, where the promoters of a tramway in any district are not the local authority, the local authority may, under the specified conditions, by notice in writing, require the promoters to sell, and the promoters shall sell to them, their undertaking, or so much of the same as is within such district, upon terms of paying the then value of the tramway "and all lands, buildings, works, materials, and plant of the promoters suitable to and used by them for the purposes of their undertaking within such district."

H. L. (E.) 1905

MANCHESTER CARRIAGE AND TRAMWAYS COMPANY, LIMITED v. SWINTON AND PENDLEBURY URBAN COUNCIL.

The question was whether the final words, "within such district," qualify the word "undertaking" or the words "all lands, buildings, works, materials, and plant." The facts are fully stated in the judgment of Lord Macnaghten.

Nov. 27. *Moulton, K.C.*, and *Astbury, K.C.* (*Eldridge* and *E. Sandars* with them), for the appellants, contended that "within such district" qualified the word "undertaking."

Balfour Browne, K.C., and *Pickford, K.C.* (*George Rhodes* with them), for the respondents, contended that "within such district" qualified the words "all lands, buildings, works, materials, and plant."

The House took time for consideration.

Dec. 15, 1905. LORD MACNAGHTEN. My Lords, notwithstanding the decision of the Court of Appeal, and a certain hesitation on the part of the learned judge of first instance which led the Court of Appeal to think that they were about to "give effect to his real opinion" by overruling the judgment he had pronounced, it does not appear to me that this case is one of any great difficulty.

The question arises on an award stated in the form of a special case. The arbitrator who was appointed by the Board of Trade was the late Sir Frederick Bramwell, a gentleman admittedly of extreme ability and of great experience in arbitrations of this sort.

The parties to the controversy were on the one hand the Swinton and Pendlebury Urban District Council, whom I will call the Swinton Council, and on the other the Manchester Carriage and Tramways Company, Limited, who were (within the meaning of the Tramways Act, 1870) "promoters" of a tramway in the district of the Swinton Council. This tramway, under statutory powers and obligations, was worked by the tramways company in connection with tramways constructed by the Salford Corporation, and by them leased to the company. In this way the tramway in question formed part of a continuous or through line to Manchester.

Adjoining the Salford main line, about a mile or three-quarters

of a mile from the limits of the district of the Swinton Council, the tramways company had two depots, known as the Ford Lane Depot and the Church Street Depot.

On January 22, 1901, the Swinton Council duly gave notice to the tramways company that they were required to sell to the council, under the conditions and in the manner provided by s. 43 of the Tramways Act, 1870, so much of their undertaking as was within the district of the Swinton Council.

On receiving the prescribed notice the promoters are bound to sell to the local authority "their undertaking or so much of the same as is within" the "district," and the purchasing authority is bound to pay "the then value"—that is, I think, the value at the date of notice—"(exclusive of any allowance for past or future profits of the undertaking or any compensation for compulsory sale or other consideration whatsoever) of the tramway and all lands, buildings, works, material, and plant of the promoters suitable to and used by them for the purposes of their undertaking within such district." The value is to be determined in case of difference by arbitration. What the arbitrator has to find is the value to the promoters, not the value to the purchasing authority, nor are the promoters under any obligation (as the Court of Appeal seems to have thought) to make a good title to the adjuncts and accessories for which the purchasing authority has to pay. If their title be infirm, if their tenure be insecure, or their possession precarious, the arbitrator, no doubt, would take that into consideration in determining the value, but the purchasers must pay the value of these adjuncts and accessories to the promoters, whatever it was at the date of the notice, even though they may be of little or no value to the purchasing authority.

The notice of January, 1901, was given at the instance of the Salford Corporation. Their lease to the tramways company was then about to expire. On its expiration they proposed to work a combined system of tramways through Swinton and Salford as one undertaking and to work it by electricity instead of using horse power. As the persons really interested in the purchase under an arrangement sanctioned by Parliament, they represented the Swinton Council in all the negotiations and

H. L. (E.) 1905

MANCHESTER CARRIAGE AND TRAMWAYS COMPANY, LIMITED v. SWINTON AND PENDLEBURY URBAN COUNCIL.

Lord Macnaghten.

proceedings consequent upon their notice to the tramways company.

After a protracted hearing and much evidence the arbitrator made his award on May 28, 1903. The award sets out with minute and perhaps unnecessary detail the relative Acts of Parliament and orders and the result of the evidence as to the two depots. And then there is a passage which seems to me to be not immaterial having regard to the view taken by the Court of Appeal. The arbitrator states that it had been agreed that two gentlemen, who are named, should value the fixtures, fittings, and utensils in and upon the said two depots "without prejudice to the question referred to hereafter as to whether the district council is compellable to buy the said two depots or either of them." That is the first allusion to the question which the special case was intended to raise. Then the arbitrator states that "at the hearing of the reference counsel for the Swinton and Pendlebury Urban District Council admitted that the council were bound to purchase and pay for the actual tramways within their district . . . . but they contended that under s. 43 they were not compellable to purchase either the Ford Lane or the Church Street Depot on the ground that even if such depots or either of them were suitable to and used by the tramways company for the purposes of their tramways they were both of them situated geographically without the district of the council, and that the said section only made it obligatory upon the local authority to purchase that which was within their district. Counsel for the tramways company contended that if such depots were in fact suitable to and used with their undertaking within the council's district, the council were, under the said section, compellable to purchase them although the depots themselves were outside the district." "I was asked," the arbitrator adds, "by counsel for the council to state my award in the form of a special case for the opinion of the Court on this point."

Now, stopping there, it seems to me that nothing can be plainer than this, that one question, and one question only, was intended to be raised by the special case. It is quite true that the arbitrator does not follow throughout this introductory

statement the exact language of the section. In the earlier part he follows it literally. In the latter part he substitutes the expression "used with" for the words "used for the purposes of." In my opinion that is a mere slip—a very natural slip—a slip which the arbitrator, if his attention had been called to it, would have been entitled to correct. Nor can I see that in this particular case there can be any difference in meaning between the two expressions. If a thing is suitable to and actually used with a tramway, I am unable to imagine how the person or company so using it can avoid using it for the purposes of the tramway. By what perverse ingenuity could it be used otherwise?

Then we come to the award. The arbitrator awards and finds "as a fact that the Ford Lane Depot, although in a limited sense used with the undertaking of the tramways company within the district of the council is not suitable to such undertaking." Then he adds, "I further award and find as a fact that the Church Street Depot was used with and is suitable to the said undertaking."

Then, following accurately the words of the section, he finds the value of the tramways and "of all lands, buildings, works, materials, and plant of the Manchester Carriage and Tramways Company suitable to and used by them for the purposes of the undertaking." He finds separately—(*a*) the value of the tramway lines; (*b*) the value of the land and buildings constituting the Church Street Depot and the tramway lines therein and the tramway line in Church Street leading into the depot; and (*c*) the value of the fixtures and fittings in and upon the Church Street Depot as per the valuation therein before referred to. The total was 49,006*l*., but the arbitrator adds that, should the Court be of opinion that the council were not compellable to purchase or pay for the Church Street Depot, then the last two items, which amounted together to 24,317*l*., were to be deducted and the value was to be reduced to 24,689*l*.

The learned judge of first instance (Channell J.) answered the question in favour of the tramways company. The answer of the Court of Appeal (Collins M.R., Stirling and Mathew L.JJ.) was in favour of the Swinton Council. The learned Lords Justices in the Court of Appeal inferred, from the variation in

H. L. (E.) 1905 MANCHESTER CARRIAGE AND TRAMWAYS COMPANY, LIMITED v. SWINTON AND PENDLEBURY URBAN COUNCIL. Lord Macnaghten.

language to which I have referred, that there was some ambiguity in the award, and that the arbitrator had it in his mind to submit to the Court some question of law which he certainly did not formulate and which the learned counsel for the Swinton Council candidly admitted he did not ask him "specifically" to state. What the question could possibly have been, I am unable to imagine. The question of user was a mere question of fact. The question of suitability was a mere question of fact. Both those questions had been answered by the arbitrator, and answered, your Lordships will observe, as questions of fact in favour of the Swinton Council. The only question which the arbitrator reserved—the question depending on geographical position—was not argued seriously at your Lorships' bar. It was determined in favour of the appellants by the learned judge of first instance. The Court of Appeal apparently did not think it worth discussing. And, speaking for myself, I do not think it is open to argument.

The learned Lords Justices in the Court of Appeal seem to have been much impressed by the consideration that the arbitrator was a gentleman of great experience and ability. They thought it most unlikely that he should have made a slip or a blunder, as they term it, and therefore they came to the conclusion that he must have meant something by the change in his language. Well, persons of the greatest experience and ability do make slips sometimes, and I must say that I should have thought it much more likely that a man of experience and ability would make a slip than that anybody of common sense in a serious document and after much consideration would present to the Court a conundrum in the form of a cryptogram.

It is not perhaps uninstructive to find that both the learned and experienced counsel in their addresses to the arbitrator made just the same slip (if it be a slip), and that the learned counsel for the Swinton Council was, if I may venture to say so, the first offender.

I therefore move your Lordships that the order appealed from be reversed and the order of Channell J. restored with costs here and below.

LORD ROBERTSON. My Lords, it is certain that in this special case the arbitrator directly, expressly, and formally states one point for the opinion of the Court. It is equally certain that no other point is, either directly, expressly or formally, stated by him, or indeed stated at all. The most that can be said, or has been said, is that it is to be inferred from his having mentioned certain things which would be relevant to the consideration of another question that he really intended to submit that other question.

To this there seem to me to be several answers, and the first is that this arbitrator has shewn by the structure of his special case that his way of stating a point for decision was to state it directly or expressly, and I must say that I think this is conclusive.

But, secondly, even if it were permissible to infer that the arbitrator really intended to submit a further point from his having mentioned things relevant for its discussion, it must be remembered (and has been forgotten) that this is not merely a special case, but an award; and many things are relevant to the award, and of a kind usually inserted in an award, which may not bear on the point submitted for decision. This special case is presented, not under s. 19 of the Arbitration Act, which provides for special cases pure and simple, but under s. 7 (*b*), which provides for awards being stated in the form of a special case. Now it cannot be affirmed, of all that is set out in this special case, that it is relevant either to the question admittedly stated or to the question now sought to be evolved out of it; and the reason is that this document serves the double purpose of award and special case.

Even if the whole of the passages in the award which are founded on by the respondents could be pressed into their service, they are ultimately confronted with the difficulty that the arbitrator has decided that the premises were suitable to the use of the undertaking. Now, it is against this conclusion that the respondents invoke the considerations of distance and inaccessibility; and this conclusion is determined against them in the exact terms of the statute.

I am unable to think that there is any veiled importance or

H. L. (E.) 1905

MANCHESTER CARRIAGE AND TRAMWAYS COMPANY, LIMITED v. SWINTON AND PENDLEBURY URBAN COUNCIL.

Lord Robertson.

significance in the use of the word "with" in the award; there is no hint or suggestion in the award of any intention in this abbreviation; and in the proceedings the word "with" was treated by both parties as convertible with the more ample expression of the statute.

I have only to add that in my opinion the words "within such district" qualify the word "undertaking," and not the words "lands, buildings, works, materials, and plant of the promoters." The reading which I adopt is the natural reading; and the reason of the thing is adverse to the opposite view, for it cannot be suggested that stables which might be close to the district, although outside it, should be excluded from the clause, while the opposite construction breaks down entirely over the words "materials and plant."

I am for reversing the judgment appealed against.

Lord Lindley. My Lords, I am also unable to agree with the Court of Appeal in this case. The arbitrator here was not stating a case for his guidance before making his award; he made an award, and set out the facts which he considered material in order to make it intelligible and satisfactory. But he made it, as he had power to do, subject to a question of law which he was asked to state, and which he did state in very clear terms, in order that it might be decided by the High Court. He was not requested to state, and did not in fact state, more than one question for such decision; and that question was whether the Church Street Depot, which was outside the Swinton district, had to be paid for. The question submitted by the arbitrator to the Court for decision has been properly decided, and this is now scarcely disputed.

But your Lordships are asked to say that the Swinton District Council desired to raise another point of law, and that the arbitrator has stated the facts in such a way as to shew that he intended to raise another question, viz., whether the Church Lane Depot could, in point of law, be said to have been "suitable to, and used by the company for, the purposes of the company's undertaking." My Lords, counsel frankly admitted that the arbitrator was never asked to refer any such question to the

High Court, and I cannot myself see that he has in fact done so. The question of suitability is one of fact, and the arbitrator has found that question in favour of the selling company. It requires no little ingenuity to discover that such a question can be regarded as a question of law; but, assuming that it can be so regarded, it is, in my opinion, manifest that no such question was intended by the arbitrator to be referred by him to the High Court, and that he has not, in fact, stated any such question for its decision. I am convinced that "used with" in the award are only short for "used for the purposes of," and that the arbitrator used the two expressions not intentionally by way of contrast, but inadvertently as synonymous. The appeal ought to be allowed with costs in the usual way.

Order of the Court of Appeal reversed, and order of Channell J. restored, with costs here and below.

Lords' Journals, December 15, 1905.

Solicitors: *Ayrton, Biscoe & Barclay, for Brett, Hamilton & Tarbolton, Manchester; Trass & Taylor, for L. C. Evans, Town Clerk, Salford.*

[HOUSE OF LORDS.]

H. L. (E.) 1906 *April* 5.

COSTER AND ANOTHER . . . . . APPELLANTS;

AND

HEADLAND . . . . . RESPONDENT.

Poor Rate—Distress—Expenses of Distress—Reasonable Charges of taking, keeping and selling Distress—Distress (Costs) Act, 1817 (57 *Geo.* 3, *c.* 93), *s.* 1, *Schedule—Distress (Costs) Act*, 1827 (7 *&* 8 *Geo.* 4, *c.* 17)—*Distress for Rates Act*, 1849 (12 *&* 13 *Vict. c.* 14), *s.* 1.

The provisions of the Distress (Costs) Act, 1817, as applied by the Distress (Costs) Act, 1827, to distresses for poor rate, are not repealed by the Distress for Rates Act, 1849, s. 1. Therefore, in the case of a distress for poor rate in respect of an amount not exceeding 20*l.*, it is illegal to make any charge for the expenses of the distress in excess of the scale given in the schedule to the Distress (Costs) Act, 1817.

The decision of the Court of Appeal, [1905] 1 K. B. 219, affirmed.

Hill v. *Pannifer*, [1904] 1 K. B. 811, overruled.

THE respondent and others having refused to pay a portion of a poor rate, a warrant of distress was issued under which their goods were seized and sold. Out of the proceeds, part was retained by the appellants (who levied the distress) to cover the expenses of the distress. The amounts due for poor rates did not exceed 20*l.*, and it was admitted that if the case fell under the Distress (Costs) Act, 1817, as applied by the Distress (Costs) Act, 1827, the charges exceeded the limit allowed by the schedule to the Act of 1817. The respondent having sued the appellants in the county court to recover the excess, the county court judge held that the Acts of 1817 and 1827 were impliedly repealed, so far as poor rates are concerned, by the Distress for Rates Act, 1849, and gave judgment for the defendants, finding as a fact that the charges were reasonable. This decision was affirmed by the Divisional Court on the authority of *Hill* v. *Pannifer*. (1) These two decisions were reversed by the Court of Appeal (Collins M.R., Stirling and Mathew L.JJ.), who entered judgment for the respondent for 5*s.* 7*d.*, the admitted excess over the schedule limit.

(1) [1904] 1 K. B. 811.

Danckwerts, K.C., and *A. E. Gill*, for the appellants. By the Distress (Costs) Act, 1817, c. 93, s. 1, where a distress for rent is made for a sum not exceeding 20*l.*, no person shall receive out of the produce of the goods distrained upon and sold any more costs and charges than those fixed in the schedule to the Act. By the Distress (Costs) Act, 1827, c. 17, the Act of 1817 was extended to distresses (inter alia) for poor rate. These are the enactments upon which the respondent must rely; without them he must fail. The 43 Eliz. c. 2 did not grant any right to levy expenses, but in *Moyse* v. *Cocksedge* (1) it was said that the necessary expenses were incidental to a distress. That opinion was not a decision—only an obiter dictum. Five years after, in 1754, by 27 Geo. 2, c. 20, power was given to deduct the reasonable charges of taking, keeping and selling the distress out of the money arising by the sale. The 27 Geo. 2, c. 20, was expressly repealed by the Summary Jurisdiction Act, 1848, c. 43, s. 36. It therefore became necessary to pass the Distress for Rates Act, 1849, c. 14, which by s. 1 enacted that in any warrant of distress for poor rate or highways rate the justices might order that a sum such as they might deem reasonable for the costs and expenses incurred in obtaining the warrant should be levied of the goods, together with the reasonable charges of the taking, keeping and selling of the distress. The Act of 1827 did no more than create an exception to the Act of 1754 in cases not exceeding 20*l.*, and when the Act of 1754 was repealed in 1848 the Act of 1827 ceased to have any application, and was virtually repealed. There was, in fact, a clean slate then, and upon it the Legislature wrote the Act of 1849. But, if this be not so, the appellants rely on *Hill* v. *Pannifer* (2), where it was held that the schedule to the Act of 1817, as applied by the Act of 1827 to poor rate, was impliedly repealed by the Act of 1849. [They also urged the arguments used in the Court of Appeal.]

Shearman, K.C., and *R. M. Montgomery*, for the respondent. The Act of 1848 expressly repealed the Act of 27 Geo. 2, c. 20, and several other Acts, but neither expressly nor indirectly affected the Acts of 1817 and 1827. There is not a word in the

(1) (1749) Willes, 636; Barnes, 459. (2) [1904] 1 K. B. 811.

H. L. (E.) 1906 COSTER v. HEADLAND.

Acts of 1848 or 1849 to suggest that the policy of limiting the charges in distresses not exceeding 20*l.* was intended to be abrogated. The three Acts of 1817, 1827, and 1849 are all perfectly consistent with one another. The limit imposed by the Acts of 1817 and 1827, read together, applies only to distresses not exceeding 20*l.* In all other cases the charges are to be reasonable.

Danckwerts, K.C., in reply.

LORD LOREBURN L.C. My Lords, I am of opinion that the judgment of the Court of Appeal was right and ought to be affirmed.

We have under consideration "charges" for "taking, keeping and selling distress." An Act of 1827, which says in terms that charges for distress shall, in cases not exceeding 20*l.*, be according to a particular schedule, is still upon the Statute Book. Here is a charge for distress in a case under 20*l.*, and that charge is beyond the schedule rate. That seems to me necessarily to conclude our decision, unless there is some special reason shewing that the Act is inapplicable.

Mr. Danckwerts says that the Act is inapplicable, because in the year 1754 there was passed a statute which provides for "reasonable charges" being made, and that the effect of the Act of 1827 was to carve out of the Act of 1754 an exception, namely, that in cases not exceeding 20*l.* only the schedule rate should be allowed. And he says that when the Act of 1754 was repealed (as happened in 1848) the substratum of the Act of 1827 fell, and, therefore, the Act itself became inoperative. He also contends that a new standard of charges, namely, that they should be reasonable, was again set up as applicable to all cases by an Act of 1849.

Now does the Act of 1849 set up a new standard and provide that in all cases "reasonable" charges shall be made? In my opinion the Act of 1849 is open to another construction, and assumes a right to "reasonable" charges as still existing, subject to the exception provided by the Act of 1827. And I think this latter is the preferable construction of the Act of 1849, for the right to "reasonable" charges exists at common law, according to the decision that was cited to us. I should

require more argument than I have yet heard before concluding that the case in question was wrongly decided. But, even if a new standard is set up by the Act of 1849, is it incompatible with the special limitation being still preserved under the Act of 1827 as to distresses not exceeding the sum of 20*l.*? I think it is not incompatible, and that it makes no difference whether the one Act precedes or follows the other. I read them both together. One of them says that the charges are to be reasonable, the other says that the charges in cases not exceeding 20*l.* are to be according to the schedule. Further, I cannot see why the fact of the Act of 1754 being repealed caused the Act of 1827 to fall to the ground. The Act of 1827 was left upon the Statute Book, and would instantly apply to any relevant subject-matter that might arise by fresh legislation.

Under these circumstances I think that the judgment in the Court of Appeal was right and ought to be affirmed, and I move your Lordships accordingly.

LORD MACNAGHTEN. My Lords, I am of the same opinion. I think the only statutes to be regarded are the statutes of 1827 and 1849. I think the statute of 1827 is a statute of universal application, and when the statute of 1849 was passed it applied to it, and would only not have applied if it had been specially excluded.

LORD DAVEY. My Lords, I agree, and on the same grounds. The reasons stated by Stirling, L.J. seem to me so clearly put that I am quite content to accept what he has said as a judgment of my own.

LORD JAMES. My Lords, I concur.

LORD ROBERTSON. My Lords, I think the clue to this case is really to be found in the effect of the Act of 1827. That is not merely a general statute, but it is a statute applicable to future rates, and lies in wait, as it were for Acts which may be passed, and imprints upon them a certain limitation.

H. L. (E.) 1906 COSTER v. HEADLAND. Lord Robertson.

Now, without pronouncing any opinion, I will assume in favour of Mr. Danckwerts that the reference to poor law in the Act of 1827 was inoperative after the Act of 1848. But it became operative or, to put it in another way, was fed by the Act of 1849. Then the only question is whether the words of the Act of 1849 are inconsistent with the Act of 1827 so strongly and clearly as to necessitate the conclusion that there was an implied repeal. I agree with my noble and learned friend on the woolsack that the words "reasonable charges" have such a latitude as to make no difficulty in the recognition of this special limitation which is driven by the Act of 1827 sectionally across all legislation in favour of persons whose rates do not exceed 20*l*.

On these grounds I think, without entering on some of the controversial matters which have been so much discussed in the very able arguments we have heard on both sides, that the judgment of the Court of Appeal ought to be affirmed.

LORD ATKINSON. My Lords, I concur.

Order of the Court of Appeal affirmed, and appeal dismissed with costs.

Lords' Journals, April 5, 1906.

Solicitors: *Wontner & Sons; Lloyd-George, Roberts & Co.*

[HOUSE OF LORDS.]

GARBUTT (Pauper) . . . . . Appellant;

AND

DURHAM JOINT COMMITTEE . . . . . Respondents.

H. L. (E.) 1906 April 6.

Police—Pension—"Approved Service"—Continuity of Service—Character of Service—Certificate of Chief Constable—Evidence to Contradict Certificate—Police Act, 1890 (53 & 54 *Vict. c.* 45), *ss.* 1, 4.

The "approved service" for not less than twenty-five years required by the Police Act, 1890, s. 1, to entitle a constable to a pension on retirement need not be continuous service.

The decisions of the King's Bench Division, [1904] 1 K. B. 522, and of the Court of Appeal, [1904] 2 K. B. 514, on this point reversed.

A certificate of "approved service" under s. 4, sub-s. 1, of the Act, that is, of diligent and faithful service, must be under the order of the police authority. The chief officer of a police force has power under s. 4, sub-s. 2, to certify as to the period of the service, not as to its character.

Appellant, having between 1876 and 1903 served in the Durham County Constabulary, applied for a pension under the Police Act, 1890, c. 45, s. 1 (*a*). The acting chief constable certified that the appellant's "total approved service" was over twenty-five years, and that "the term of approved service above has been diligent and faithful service within the meaning of s. 4 of the Police Act, 1890." The certificate shewed that the service had not been continuous, being broken in 1881 by the appellant's resignation, and in 1887 by his being called on to resign. In each case he was reinstated after a few months, and in 1897 he was put into the "long and faithful service class." The respondents having refused the pension, the appellant appealed to quarter sessions.

At the hearing the respondents contended that the service must be continuous, also that the certificate, though "sufficient evidence," was not conclusive, and that the acting chief constable could not certify as to character; and they tendered evidence to the effect that the service had not in fact been diligent and faithful service, and contended that the respondents

H. L. (E.) 1906 GARBUTT v. DURHAM JOINT COMMITTEE.

were entitled to exercise their discretion as to granting or withholding a pension on the ground of misconduct. The Court thought that it was not open to the respondents to contradict the certificate, and refused to receive the evidence as to character, but dismissed the application on the ground that the service was not continuous. The Court stated a special case raising the questions whether they were right (1.) in dismissing the application on the ground stated, and (2.) in rejecting the evidence tendered.

The decision of quarter sessions was affirmed on the first point by the King's Bench Division (Lord Alverstone C.J., Lawrance and Kennedy JJ., Kennedy J. expressing grave doubts), and again by the Court of Appeal (Collins M.R. and Stirling L.J., Mathew L.J. dissenting).

The question as to the evidence was not decided in either Court.

Pickersgill and *Simey*, for the appellant. There is nothing express or implied in the Police Act, s. 1, which requires "approved service" to be continuous. The words "if he has completed not less than twenty-five years' approved service," every constable "shall be entitled to retire and receive a pension for life," must be read in their plain, literal meaning. It will not be disputed that this would be so, but for s. 4, sub-s. 5, and s. 5, sub-s. 5. It is said that s. 4, sub-s. 5, is superfluous if the service mentioned in s. 1 need not be continuous. But s. 4, sub-s. 5, is not superfluous, since by implication it gives an army reserve man (who has been called out of the police for his training) the right of returning to the police force at the end of his training. It may, however, have been inserted ex abundanti cautela. And so with s. 5, sub-s. 5, which deals with the case where a constable has retired through incapacity for duty and been pensioned and rejoins the force. To override the effect of s. 1 by ss. 4 and 5 would be to violate the rules of sound construction: see per Lord Selborne in *Hough* v. *Windus*. (1) The construction of the respondents requires the words "if continuous" to be inserted

(1) (1884) 12 Q. B. D. 224, at p. 229.

in s. 1. If the Legislature had meant that, it would naturally have expressed it: see also ss. 30 and 36.

Shearman, K.C., and *Meynell*, for the respondents. Upon the first point the words of s. 1 are reasonably capable of two constructions. It is therefore right to look at the other sections to see which construction ought to prevail. Looking at s. 4, sub-ss. 4 and 5, s. 5, sub-ss. 3, 4 and 5, ss. 10 and 11, and s. 21, the conclusion seems tolerably clear that as a rule the service must be continuous, though in some cases it is specially provided that it need not be continuous.

On the second point, there is a marked distinction between a certificate by the police authority and one by the chief officer. By s. 4, sub-s. 1, "approved service" means such service as may be certified under the order of the police authority to have been diligent and faithful service. By s. 4, sub-s. 2, a certificate signed by the chief officer of a police force as to the period of a constable's approved service in that force shall be sufficient evidence thereof. The latter certificate is the only one in this case, and it can only certify the period; and it is only "sufficient evidence thereof," not conclusive. The chief officer has no power to certify (as he has done in this case) the character of the service. That is exclusively for the police authority.

Pickersgill and *Simey*, in reply upon the second point only. The certificate given in this case by the chief constable of a county police is a certificate both of the period and of the character of the service—"diligent and faithful within the meaning of s. 4." It fulfils all that is comprised in s. 4, sub-ss. 1 and 2; otherwise the certificate is merely a matter of arithmetic. Moreover, the certificate, being by the chief officer of the police, was no doubt made "under the order of the police authority," probably by a standing order. The words "sufficient evidence thereof" mean conclusive evidence.

[The authorities cited in the Courts below were discussed.]

LORD LOREBURN L.C. My Lords, this Act is so unfortunately drawn that there is room for a good deal of doubt with regard to its true meaning; but in my opinion the Act does not require the service to be continuous. It does not say so, and twenty-

H. L. (E.) 1906 GARBUTT v. DURHAM JOINT COMMITTEE. Lord Loreburn L.C.

five years' service means prima facie that the man has served for twenty-five years, and none the less because he happens to have allowed an interval or intervals to interrupt the period of that service. Only one section, namely, s. 4, sub-s. 5, can be said to be unfavourable to this view. That particular sub-section does seem to have been drawn in the thought that the service must be continuous service. But I think it is a superfluous section inserted ex abundanti cautela, and the natural meaning of the language used at the commencement of the Act ought not to be affected by the presence of a clause like that.

With regard to the second contention urged by the respondents at quarter sessions a more serious point arose. The police authority, that is, the standing joint committee, offered on that appeal evidence to shew that the service had not been "diligent and faithful service" within the meaning of the Act. They had given no certificate under s. 4, sub-s. 1, of the Act. On the appeal, which was really and in substance an appeal against them for refusing to give a certificate under that sub-section, they proposed to give proof in support of their contention that the service had not been "diligent and faithful," but that evidence was rejected on the ground, as I understand it, that a different certificate which had in fact been given was conclusive. It was a certificate under the 2nd sub-section of s. 4, which has to be signed by the chief officer as distinguished from the police authority. In the first place, in my opinion, the certificate of the chief officer was not conclusive of anything. It was sufficient evidence—that is to say, the Court might act upon it if they thought fit. In the second place, I think that the chief officer's certificate had no bearing upon the point of "diligent and faithful service," but was only evidence of the period, not of the fact whether there had been in the true sense of the words approved service or not. If it were otherwise, the chief officer would, it seems to me, in these matters completely supersede the police authority.

This second point was not decided in either of the Courts below, because upon the view they took upon the first point it became immaterial. It is necessary for us to decide it now.

My Lords, the answer I propose to give to the two questions

put in the case stated is as follows: The first is, "whether we" (the Court of quarter sessions) "were right in dismissing the application on the ground stated"—that is, that the service must be continuous. I think they were wrong. The second question is "whether we" (the Court of quarter sessions) "were right in rejecting the evidence tendered on behalf of the respondents." I think also in that case they were wrong. This case must therefore now, after the litigation which has already taken place, go down to be re-heard by the Court of quarter sessions.

Lord Macnaghten. My Lords, I agree with my noble and learned friend on both points.

Lord Davey. My Lords, on the first point I confess that the inclination of my mind—I cannot say it is more than that—is rather in favour of the view taken by the Court of Appeal and by the Lord Chief Justice. My doubts, however, are not sufficiently strong to lead me to dissent from the motion which my noble and learned friend has made upon that ground.

With regard to the second point, I entirely agree with what the Lord Chancellor has said, and I should not add anything if it were not for what seems to me to be the entirely fallacious argument which has been used in support of the opposite view.

If I understand the argument rightly the effect of the 2nd sub-section of s. 4 is said to be that "a certificate signed by the chief officer of a police force" is "sufficient evidence" both of the constable's service being "approved service" and also of the period of it. In my opinion that is not the construction of the language, and that cannot be taken to be the meaning without violence to the words. It seems to me to be based upon an entire mistake as to the 1st and 2nd sub-sections. The 1st sub-section says that "approved service" shall for the purposes of this Act mean such service as may, after such deductions as aforesaid (if any), be certified under the order of the police authority to have been diligent and faithful service. Therefore you must first have a certificate under the order of the police authority, which the certificate before us does not purport to be. You must have a certificate under the order of the police authority

H. L. (E.) 1906 GARBUTT v. DURHAM JOINT COMMITTEE. Lord Davey.

of diligent and faithful service. Then, in order to ascertain what the period of that service is, you must look at the other sub-sections of the section, sub-ss. 2 and 3. Taking sub-s. 3 first, you find that certain deductions may be made from the period which counts for approved service in respect of "sickness, misconduct or neglect of duty." As to those the chief constable is made the arbiter. The chief constable is therefore the proper person to certify under sub-s. 2 what is the length of the period which you are to count as approved service.

I cannot read sub-s. 2, as Mr. Pickersgill does, as meaning the same certificate as is to be made under sub-s. 1. If I understand his reading of the two sub-sections it is this: True it is that the approved service requires to be certified under the order of the police authority, but by sub-s. 2 a certificate signed by the chief constable is "sufficient evidence that that authority has been given." I cannot read it in that sense. I think that sub-ss. 1, 2 and 3 form a consistent whole shewing what evidence is required, first—that it is approved service; and, secondly, what the period which will count for approved service is to be.

LORD JAMES. My Lords, as this case is apparently to be remitted to the Court of quarter sessions, I think it is well that those who have to hear the case should be clear as to what the judgment of your Lordships is.

My noble and learned friends the Lord Chancellor and Lord Macnaghten have already expressed the view that the service need not be continuous in order to entitle the appellant to his pension. In those opinions so delivered I entirely concur. The section on which we have the claim made for this pension says that "if the constable has completed not less than twenty-five years' approved service," and is of the prescribed age, he shall, after due notice of his desire to retire, "be entitled without a medical certificate to retire and receive a pension for life." Those words are absolute and distinct, and I cannot understand why, if it was the intention of the Legislature that that service should be continuous, the word "continuous" was not inserted in that section.

I have listened to the able arguments which have been put

before your Lordships as to the effect of certain other sections in the Act, but I am bound to say that the words of Lord Selborne in *Hough* v. *Windus* (1) appear to me to be the correct and governing authority. Those sections were probably, or possibly, not put in when the Act was framed, but have come into the Act in this way: Those who have been in either House of Parliament know full well what occurs when a Bill is in Committee. Someone wishes a particular point to be made quite clear, and he asks that a certain section or certain words shall be inserted. Then it is said, "We do not need it, because the general words cover it." The answer is, "If the general words cover it, why should we not have the section to make it clear?" The Minister in charge of the Bill, following expediency, sooner than continue the discussion says, "You shall have the clause"; and then that clause is produced afterwards, before those who have to deal with the matter judicially, as a proof that the first clause is to be done away with, or that its principle is to be done away with. I admit that it is a very unfortunate position that the judges are placed in; but before the express words of a statute can be altered so as to have a different meaning that alteration ought to be clearly expressed. Therefore, my Lords, in this case I follow the words of the section, and I say that continuous service is not necessary.

My Lords, the second point is one on which with very great regret I am compelled to arrive at the same conclusion as my noble and learned friends. In his able argument Mr. Pickersgill said that a general order to the chief constable may be presumed to exist. I wish I could give effect to that, but I do not think it is a sound argument, for this reason—it is a question of fact whether that order was given or not. That order could easily have been produced before the Court if it had been in existence. I think it is necessary, although I regret it, that an opportunity should be afforded to the police authority to shew that the service for the required period of twenty-five years had not been diligent and faithful, and, therefore, this case must be remitted to the Court of quarter sessions.

(1) 12 Q. B. D. 224, at p. 229.

H. L. (E.) 1906

GARBUTT v. DURHAM JOINT COMMITTEE.

LORD ROBERTSON. My Lords, on the first point I do not differ. On the second point I entirely agree.

The relative functions of the police authority and the chief constable may, I think, be thus stated: The quality of the service has to be ascertained by the police authority; and the chief constable, taking the word of the police authority for its quality, is then on that footing to certify its period.

LORD ATKINSON. My Lords, I think that the words of s. 1 in their natural meaning are not confined to continuous service, and I do not think that there is any such repugnancy between that construction of them and the provisions of the other sections of the Act which have been referred to as would oblige this House to confine them to continuous service.

With regard to the second point, I think it is clear, upon the construction of sub-ss. 1 and 2 of s. 4, that the functions of the police authority and the officer of the police are respectively that the police officer certifies to the length of service, and the police authority has to certify to its character and nature. The Court of quarter sessions was, I think, entitled to receive the evidence that was tendered but rejected.

Order that it be declared that both the questions in the special case be answered in the negative, and the case remitted to the Court of quarter sessions to be reheard; order of the Court of Appeal reversed with costs here and below, the costs in this House to be taxed in the manner usual when the appellant sues in forma pauperis.

Lords' Journals, April 6, 1906.

Solicitors: *Bell, Brodrick & Gray, for Arthur Geipel, West Hartlepool; Maude & Tunnicliffe, for L. S. Iliff, Sunderland.*

[HOUSE OF LORDS.]

LEWIN AND OTHERS . . . . . APPELLANTS; H. L. (E.) 1906

AND

END . . . . . RESPONDENT. *May* 3.

Rating—"House"—"Inhabitant"—"Occupier"—House occupied otherwise than as a Dwelling-house—Parish of St. Paul, Covent Garden—Rector's Rate—51 Geo. 3, c. cl., s. 2.

Houses in the parish of St. Paul, Covent Garden, were used as warehouses, counting-houses, and offices. They had formerly been used for residence, but no longer contained bedrooms, kitchens, or fireplaces, and no person slept there. They could readily be fitted for use as dwelling-houses:—

Held, that they were liable to the rector's rate as "houses" within the meaning of 51 Geo. 3, c. cl., s. 2.

The decision of the Court of Appeal, [1905] 1 K. B. 669, reversed.

THE appellants, as churchwardens of the parish of St. Paul, Covent Garden, sued the respondent in the county court for the rector's rate, in respect of a building which consisted of three houses communicating with one another by doors. The learned judge found as facts that the houses were occupied by the respondent as counting-houses, warehouses, and offices, that fireplaces (which existed when the houses were used as residences) were taken out when the alterations were made by the respondent to make them suitable for the purposes of his business as a fruit merchant, that no rooms were fitted up or furnished as bedrooms, that in their present condition they were not capable of being occupied as dwelling-houses, and held that they were not liable to the rate. No caretaker or other person slept there.

This decision was affirmed by the Divisional Court (Lord Alverstone C.J. and Kennedy J.), and again by the Court of Appeal (Vaughan Williams, Romer, and Stirling L.JJ.), on the authority of *Surman* v. *Darley*. (1) The 12 Car. 2, c. 37, enacted (inter alia) that for the maintenance of the rector and other officers of the church of St. Paul, Covent Garden, the yearly sum of 250*l.* should be charged "upon the houses of the inhabitants of

(1) (1845) 14 M. & W. 181.

H. L. (E.) 1906 LEWIN v. END.

the parish of St. Paul, Covent Garden" (except Bedford House), and should be assessed by the churchwardens. The 51 Geo. 3, c. cl., by s. 1 repealed the above provision, and by s. 2 enacted that in lieu of the 250*l.* the sum of 520*l.* should be "charged upon all houses within the said parish," and should be assessed and rated by the churchwardens, and that all such rates and assessments should be paid by "the respective occupiers of such houses respectively."

May 1. *Macmorran, K.C.*, and *Clarke Hall*, for the appellants. The word "houses" in the 51 Geo. 3, c. cl., of course includes dwelling-houses, but is not restricted to this meaning. The Courts below appear to have considered themselves bound not only by the decision in *Surman* v. *Darley* (1), but also by the dicta. The decision was that Covent Garden Theatre was not a "house" within the meaning of the Act. The dicta were that the Act applied "only to dwelling-houses occupied by individuals as such" (Pollock C.B.); and that it clearly meant to impose the charge only on dwelling-houses, or at all events on those "which are capable of being occupied as such" (Alderson B.); or, as the *Law Journal* has it, "which are capable of being *made* such." The decision, no doubt, was right, but the dicta are questionable, and certainly are not binding. A building calculated to be used as a dwelling-house, though not used as such, is properly described as a "house": *Daniel* v. *Coulsting*. (2) The Act of 12 Car. 2 contemplated that the houses should be "inhabited." The 51 Geo. 3 did not, only that they should be "occupied." These houses are "occupied" all the daytime, and are not the less "houses" because no one sleeps in them. They are in their present state "fit for the habitation of man," or can easily be rendered fit. A practice founded upon an erroneous construction of a statute, however old, may be corrected: *Hamilton* v. *Baker* (3), per Lord Macnaghten. The present building has always been a "house" within the ordinary meaning of mankind.

(1) 14 M. & W. 181; 14 L. J. (N.S.) M.C. 145, at p. 147.
(2) (1845) 7 M. & G. 122.
(3) (1889) 14 App. Cas. 209, at p. 222.

John Sanderson and *Frampton*, for the respondent. This House held, in *Kirby* v. *Hunslet Assessment Committee* (1), that an old practice must be followed. From the fact that the rate was levied for the support of the rector, curate, clerk and sextons, those who were to be rated would naturally be the persons who would be benefited by the services of those officials. Here the occupier would not derive any such benefit. The Acts contemplate residence, and these houses are not only not fit for residence but cannot be made so without great alterations.

[They also cited the cases referred to in the Court below.]

Macmorran, K.C., in reply. Where the 51 Geo. 3, c. cl., intends to designate a dwelling-house it does so expressly, as in s. 8, where a demand in writing is to be made "at the dwelling-house of any of the churchwardens."

May 3. LORD LOREBURN L.C. My Lords, the point arising on this appeal is quite a short point. It is whether the occupier of buildings, which comprise 11, York Street, and 28 and 30, Wellington Street, in the parish of St. Paul, Covent Garden, is liable to a rector's rate made under an Act of 51 Geo. 3, c. cl., following upon an Act of Charles II. Under the first-named Act the rate is to be borne and paid by the occupiers of all houses within that parish. If these premises are a house or houses within the meaning of the Act, then the appellants must succeed. Otherwise they must fail.

The Court of Appeal (and I am sure the Divisional Court also) considered themselves bound by certain dicta in *Surman* v. *Darley* (2), from which they did not feel at liberty to dissent. This was evidently the governing consideration which influenced their judgment. Your Lordships are not so bound.

The premises in question, of which we have a photograph, certainly bear the external aspect of houses, and except in a Court of law one would hardly describe them as anything else. They consist of buildings which communicate with one another by doors, and are used as counting-houses and warehouses. All the fireplaces are taken out except one. There are no rooms fitted up or furnished as bedrooms, nor does anyone sleep on the

(1) [1906] A. C. 43. (2) 14 M. & W. 181.

H. L. (E.) 1906 LEWIN v. END. Lord Loreburn L.C.

premises. In fact these are former dwelling-houses which have been adapted for their present use by internal changes. The learned judge of the Westminster County Court has described these changes. And from what he and the witnesses say, it seems clear that slight internal alterations, of which the principal would be restoring the fireplaces, could make them quite capable of being occupied as dwelling-houses again. In their present condition, without those slight alterations, they could not be so used, at all events not in the ordinary way.

The Act does not give any definition of what is meant by the word "house," but imports that it shall be a place of residence. If a building is dwelt in—I do not mean the mere presence of a caretaker—no point can arise. If it be not so used, then in my opinion the structure and character of the building as a whole should be regarded, in order to see whether it is fit or can readily be fitted for such use by any class or condition of persons in the ordinary way of living.

Applying that test, I think this building falls within the Act of Parliament, and that therefore the appellants must succeed.

LORD JAMES. My Lords, I am sure every member of this House will feel that there is some responsibility attaching to altering a course of practice that has been pursued in consequence of a judgment delivered sixty years ago; but that responsibity is lightened by the fact that the judgment given in *Surman* v. *Darley* (1) will in no way be affected by the judgment that has just been delivered. What we are dealing with is obiter dicta, not necessary for the purpose of that decision. When those very learned judges stated that the Opera House was not a "house" coming within the statute their judgment would have been complete, but words were used saying that what was intended was a "dwelling-house." Now as there is some difference in the reports, even a slight want of care on the part of the reporter may have caused that dictum to present a different aspect. Also it may be that the word "dwelling-house" was used without the intention of deciding what was

(1) 14 M. & W. 181.

a house that would be subject to the rate; it may have been used only by way of contrast with the Opera House in Covent Garden or the playhouse in Drury Lane. We are left in this position: no definition is given even in the obiter dictum of what is the meaning of "dwelling-house." I think, therefore, we are relegated to our duty of looking at the statute and seeing what is the meaning of the words we find there.

There is only one other consideration that can affect this question in regard to the decision given long ago, and that is as to acquiescence. No doubt a practice established in consequence of the judgment of a Court of law given long ago ought not to be lightly set aside when there has been apparently a consensus of acquiescence in that judgment; but in this particular case there is this peculiarity, that there was nobody here interested to object to it. A churchwarden, if he obtains his 3*d.* rate from a small number of persons, is as well off as if he is paid a 2*d.* rate by a proportionally larger number of persons; therefore, he would be careless as to how far the obiter dictum affected the rateability in his parish. So far, therefore, there is no acquiescence such as generally occurs when a judgment has been given and the public have acted upon it.

We have to see whether this edifice is a house, and also whether there is an occupier of that house. If those two things are found existing in fact, I presume your Lordships will agree that the rateability attaches under the statute. I must say it seems to me, as a matter of fact and common sense, looking at this building as shewn in the photograph, and looking to its use, that it certainly is a "house." A man may carry on business in a house as well as in a warehouse or an office, and if there remains a structure which can be applied to the purposes to which an ordinary house is applied, then I think the words in the 2nd section of the later Act are satisfied.

LORD ROBERTSON. My Lords, I agree in the judgment proposed. I may add that the conclusion arrived at derives substantial support from the occurrence in the 8th section of the statute of the word "dwelling-house," for this shews that the narrower conception was present to the mind of the Legislature, and, when

H. L. (E.) 1906

LEWIN v. END.

it was intended, received distinct expression not by the word "house," but by the word "dwelling-house."

LORD ATKINSON. My Lords, I concur. The question turns upon the meaning of the word "house." I think it must mean a dwelling-house. By a "dwelling-house" I understand a house in which people actually live or which is physically capable of being used for human habitation. It was admitted in the argument that if people were actually inhabiting the upper portion of the house the whole structure could be treated as a dwelling-house, notwithstanding the alterations in the ground floor. I think the trifling alterations made in the upper portion of the house do not change its character, but that, on the contrary, it could be easily restored to its former state, and when so restored would be fit for human habitation. I therefore think it comes within the words of the statute.

Order of the Court of Appeal reversed with costs here and below.

Lords' Journals, May 3, 1906.

Solicitors: *Bartlett & Large*; *Harry Wilson & Co.*

[HOUSE OF LORDS.]

BUTTERKNOWLE COLLIERY COMPANY, LIMITED . . . . . } APPELLANTS;

AND

BISHOP AUCKLAND INDUSTRIAL CO-OPERATIVE COMPANY, LIMITED . } RESPONDENTS.

H. L. (E.) 1906 *May 7.*

Inclosure Act, Construction of—Mines—Reservation of Manorial Rights—Right to support of Surface—Damage to Surface—Compensation.

Before 1757 the lord of a manor had the right to work mines and minerals under the waste lands of the manor so as to let down the surface, provided enough pasturage was left to satisfy the rights of the commoners. By an inclosure Act of 1757 the waste lands were enclosed and allotted, and the lord of the manor was empowered to work the mines and minerals under the allotments as fully and freely as he might have done if the Act had not passed, and that without making or paying any satisfaction for so doing. A compensation clause in the Act provided that any damage done to an allottee by the exercise of the powers reserved to the lord should be paid for by an assessment upon the occupiers of the other allotments:—

Held, that upon the true construction of the Act, the common law right of the surface owners to the support of the surface was not taken away by express words or necessary implication.

The decision of the Court of Appeal, [1904] 2 Ch. 419, affirmed.

In 1757 an inclosure Act of 31 George II. was passed for enclosing and dividing the commons and waste lands of a manor under the circumstances stated in the judgment of Lord Loreburn L.C. The clauses relating to the mineral rights of the lords of the manor are fully set out in the report in the Court below. Briefly they were as follows: The lords were to have and enjoy all mines and quarries in and under the commons and waste lands (other than certain excepted quarries) with all convenient and necessary ways and wayleaves, and liberty of laying and repairing waggon ways and other ways, and of searching for, winning and working the mines and quarries and carrying away the minerals, stones, &c., and making drifts, levels, watercourses, and other usual liberties "as fully and freely as they might or could have had and enjoyed the same in case this Act had not been made, and that without making or paying any satisfaction for so doing."

H. L. (E.) 1906

BUTTERKNOWLE COLLIERY COMPANY v. BISHOP AUCKLAND INDUSTRIAL CO-OPERATIVE COMPANY.

The next clause provided that as often as any person should suffer damage in his allotment by the working of the mines and quarries, or the laying and repairing waggon ways and other ways, or the carrying away the minerals, stones, &c., or making drifts, &c., or other liberties reserved to the lords, upon complaint the county justices should inquire into the complaint in a summary way and assess the damages, the damages to be paid by the occupiers of the other allotments in the same township according to their yearly values in such proportion as the justices should direct; and in case of neglect or refusal to pay the said proportions, the justices should cause the same to be levied by distress and sale of the goods of the person or persons so neglecting or refusing.

Farwell J. and the Court of Appeal (Vaughan Williams, Romer, and Cozens-Hardy L.JJ.) held that the Act did not expressly or by necessary implication take away the common law right of support to the surface, and that the appellants were not entitled to work so as to let down the respondents' lands and buildings.

March 5, 6, 8, 9. *Neville, K.C.*, and *Danckwerts, K.C.* (*MacSwinney* with them), for the appellants. The question is one entirely of the construction of this particular inclosure Act. The long-established principle is not contested, viz., that the intention to take away the right of the owner of the surface to have proper support for the surface must appear from express words or necessary implication. Here the words give rise to a necessary implication, if the natural, grammatical meaning is given to them; they are wide, general and unrestricted.

The Act contains in effect a statutory grant to the lord of the mines and quarries involving a right to let down the surface, and that without making any compensation. He is to enjoy his previous rights as fully and freely as before the Act. The meaning must be that the right of letting down the surface is not taken away, for that right he admittedly enjoyed provided sufficient pasturage was left for the commoners. The clause that no compensation is to be paid by the lord "for so doing," that is, for letting down the surface, must be read with the clause requiring compensation to be paid by the owners of the other allotments.

For this construction there is sufficient authority: *Gill* v. *Dickinson* (1); *Consett Waterworks Co.* v. *Ritson* (2); *Smith* v. *Darby* (3); *Duke of Buccleuch* v. *Wakefield* (4); *Buchanan* v. *Andrew* (5); *Bell* v. *Earl of Dudley.* (6)

Upjohn, K.C., and *Cave, K.C.* (*F. H. Schwann* with them), for the respondents. This is a pure question of construction. The principle underlying all the authorities is that the surface owner has the right of support unless it is taken away expressly or by necessary implication: *Davis* v. *Treharne* (7); *Love* v. *Bell* (8), which covers every point in the present case; *New Sharlston Collieries Co.* v. *Earl of Westmorland.* (9) There are no words in the present Act contemplating the letting down of the surface. It is clear that the Legislature cannot have intended the trifling compensation which could be got out of unsubstantial holders of allotments to be any satisfaction for the damage to land and buildings by letting down the surface. The words on which the appellants rely are fully satisfied by surface operations.

Neville, K.C., in reply.

The House took time for consideration.

May 7. LORD LOREBURN L.C. My Lords, in this case the plaintiffs claim a declaration that the defendants are not entitled, as against them, to work the defendants' mines so as to lower or depress the surface of certain lands in the parish of Hamsterley, or so as to injure any of the plaintiffs' buildings standing thereon, together with an injunction and damages; and the defence in substance is that the defendants are entitled so to work their mines under the terms of an inclosure Act of 31 George II.

The facts material to a decision may be summarized as follows:—Prior to the inclosure Act the Lords Bishops of Durham, who are the defendants' predecessors in title, were

(1) (1880) 5 Q. B. D. 159.
(2) (1889) 22 Q. B. D. 702.
(3) (1872) L. R. 7 Q. B. 716.
(4) (1870) L. R. 4 H. L. 377.
(5) (1873) L. R. 2 H. L. Sc. 286.
(6) [1895] 1 Ch. 182.
(7) (1881) 6 App. Cas. 460.
(8) (1884) 9 App. Cas. 286.
(9) [1904] 2 Ch. 443, n.

H. L. (E.) 1906

BUTTERKNOWLE COLLIERY COMPANY v. BISHOP AUCKLAND INDUSTRIAL CO-OPERATIVE COMPANY.

Lord Loreburn L.C.

lords of the manor of Wolsingham. Certain commoners had rights of common of pasture over the commons, moors, or waste lands of the said manor, and, except for those pasturage rights, no persons other than the Lords Bishops of Durham had any rights in respect thereof. The mines and minerals belonged to the lords of the manor, who had full power to work them, subject only to the commoners' rights of pasturage. Accordingly the lords were at liberty to work their mines so as to lower the surface, provided they left sufficient pasturage to satisfy the rights of the commoners.

Under these circumstances an inclosure Act was passed in the 31st year of George II., under which the commoners' rights of pasturage were extinguished and the common was divided into allotments, which were apportioned among the various commoners. The lands in question in this action are the lands or part of the lands allotted to Christopher Jackson, in pursuance of the inclosure Act, and Christopher Jackson was the predecessor in title of the plaintiffs.

Under the same Act the rights of the lords of the manor to the mines and minerals were dealt with in two clauses, upon the construction of which the determination of this case must depend. It is not in dispute that the mines have been worked so as to cause damage to the land by lowering or depressing the surface, nor is it disputed that the defendants' workings were quite proper and in the usual method of working, except in the sense that they in fact damaged the plaintiffs' property, without, as is alleged, any legal right to do so.

Before examining the clauses in this particular inclosure Act, it is necessary to consider the effect of previous decisions. Many authorities have been cited in argument. Two of them are upon this very Act and these clauses. In the first of these, *Blackett* v. *Bradley* (1), the Court of Queen's Bench held that the surface was entitled to support. In the second case, *Gill* v. *Dickinson* (2), the Court held the contrary. We cannot derive clear guidance from those authorities.

The numerous other decisions to which we have been referred are undoubtedly of value. I do not propose to travel through

(1) (1862) 1 B. & S. 940. (2) 5 Q. B. D. 159.

them. It will be sufficient to state propositions which they appear to have established.

Whenever the minerals belong to one person and the surface to another, the law presumes that the surface owner has a right to support, unless the language of the instrument regulating their rights, or other evidence, clearly shews the contrary. In order to exclude a right of support, the language used must unequivocally convey that intention, either by express words or by necessary implication. For the same presumption in favour of a right of support which regulates the rights of parties in the absence of an instrument defining them will apply also in construing the instrument when it is produced. If the introduction of a clause to the effect that the mines must be worked so as not to let down the surface would not create an inconsistency with the actual clauses of the instrument, then it means that the surface cannot be let down.

Illustrations are numerous in the reports. Words, however wide, that merely authorize the getting of all the minerals, have been held not to authorize so getting them as to let down the surface. Where power is given to get the minerals on paying compensation for damage done to the surface, the Court will still scrutinize the compensation clause. Are there any rights belonging to the mine owner on the surface (such as a right of making roads) to which the compensation clause may refer? If the compensation clause is capable of being satisfied by reference to acts done *on* the surface, then, though it may be wide enough to cover also damage done *to* the surface by taking away the support, still it must be confined to damage done *on* the surface, and the inference that support may be taken away on payment of compensation will not be drawn. Again, Courts have asked whether the compensation is manifestly inadequate for such an injury as letting down the surface, and have commented upon the absence of any provision for compensation. Either of these circumstances has supplied judges with a reason for so cutting down wide language in a grant of minerals as to imply a condition that the surface shall be supported. The process of reasoning in such cases seems to be that parties must not be supposed to have intended what would be unreasonable

H. L. (E.) 1906 — BUTTERKNOWLE COLLIERY COMPANY v. BISHOP AUCKLAND INDUSTRIAL CO-OPERATIVE COMPANY. — Lord Loreburn L.C.

and unjust. I think that in each of them a clause providing for a continuance of support would not have been inconsistent with the actual clauses.

The most extreme instance of the solicitude displayed by Courts of law for the maintenance of the right of support is to be found in the case of *Love* v. *Bell* (1), decided in the House of Lords in 1884. In that case the waste of a manor was enclosed under an inclosure Act. All rights of common were extinguished, and the commoners received allotments in exchange. Before the Act was passed the lords of the manor owned the minerals and were entitled to work them so as to let down the surface, provided they left enough of the surface undisturbed to satisfy the commoners' rights of pasturage. Under that Act the minerals and other royalties were reserved to the lords, "in as full, ample, and beneficial manner to all intents and purposes as they could or might have held and enjoyed the same in case this Act had not been made," provided that if they should work the mines under any allotment, or use ways, &c., over any allotment, they should make "satisfaction for the damages and spoil of ground occasioned thereby to the person or persons in possession of such ground at the time or times of such damage or spoil" not exceeding 5*l.* yearly for every acre so damaged or spoiled. In the face of these facts and enactments the House of Lords held that the lords were bound to support the surface.

Lord Selborne explained that the clause enabling the lords to work their mines as fully as if the Act had not been passed did not mean they could disturb the surface as they had been able to do when the land was common waste. Just as the maxim "Sic utere tuo ut alienum non lædas" required them to leave sufficient pasturage when the commoners' rights were to have pasturage, so it now required them to leave support when the commoners' rights had been commuted for allotments. He held also that when the Act provided compensation for damage it meant compensation for damage by working the mines with only the usual powers, that is, without letting down the surface. Both these conclusions were essential to the decision at which the

(1) 9 App. Cas. 286.

House of Lords unanimously arrived in *Love* v. *Bell* (1), and, it seems to me, are binding upon us.

I now come to the clauses of the inclosure Act with which we have to deal in the present appeal, and I am of opinion that the respondents are entitled to support because the language of the Act admits of an interpretation which preserves that right. I find a clause authorizing the lords to do a number of things, such as work the mines and quarries, use the surface for waggon ways, or other ways, making drifts, levels, and waterways, "as fully and freely as he or they might or could have had and enjoyed the same in case this Act had not been made, and that without making or paying any satisfaction for so doing."

Mr. Neville pressed us to give full effect to these words. He said if the Act had not been passed, the lord had the right to let down the surface provided he left sufficient unbroken land to satisfy the old commoners' right of pasturage. That is so, and I might be entitled to assent to Mr. Neville's argument if I were not bound by the authority of *Love* v. *Bell.* (1) The construction placed upon particular words in one instance does not necessarily prejudice their construction when in a different setting. But the principle laid down by Lord Selborne in that case lay at the root of the judgment, and it amounted to this, that when the nature of the commoner's interests is changed by an inclosure Act, such as this, his right to support changes also (unless otherwise provided), and the owner of minerals must work them in a way not to damage the extended interest which the commoner has acquired under the Act. If that principle was applicable in the case of *Love* v. *Bell* (1) I cannot see how it is to be excluded in the present case.

Mr. Neville next pointed to the last words in the clause, viz., "and that without making or paying any satisfaction for so doing." Now, what does "so doing" mean? It means, in my opinion, doing any of the things which the clause authorizes to be done. One of them is winning and working the said mines. But there are also other things authorized in the same clause. Some of them are things in connection with working the mine which must be done upon the surface, such as making waggon

(1) 9 App. Cas. 286.

H. L. (E.) 1906

BUTTERKNOWLE COLLIERY COMPANY v. BISHOP AUCKLAND INDUSTRIAL CO-OPERATIVE COMPANY.

Lord Loreburn L.C.

roads, and the provision that the mine owner shall not make any satisfaction is capable of being applied to damage which the working may thus cause to the surface without letting it down at all. The meaning may be, and I ought, therefore, so to read it, that the lord is not to pay for any damage done to the surface by exercising his right of winning and working, that is to say, his right of winning and working so as to leave the proper support. It does not excuse him from paying the damage if he so wins and works as not to leave support.

It is quite true, as urged by Mr. Neville, that the clause I have just criticized ought to be read with the following clause, which prescribes that other persons are to make the satisfaction which the lord is exempted from making. To my mind the latter clause strongly favours the construction which I put on the former. It requires the occupiers of adjoining allotments to make good the damage done to any allotment by the exercise of the lord's rights, including the right of winning and working coal, and authorizes a distress on their goods and chattels in the event of failure to pay. This is a curious enactment if it applies to such damage as that which might be caused by subsidence. Why should occupiers with a temporary tenancy pay for permanent injury? What must have been the kind of compensation contemplated by the authors of the Act when they prescribed a distress on the goods and chattels of an allotment occupier as an appropriate means of levying the amount? On the other hand, such a provision might be suitable enough in a case of trifling damage, or even in case of quarries being opened, which, though they ruin the surface, do not extend over a great space. I do not dwell upon this subject, because Farwell J. has exposed in his judgment the consequences which would flow from the construction urged upon us by the appellants.

Under these circumstances I am of opinion that the judgment of Farwell J. and of the Court of Appeal is right and ought to be affirmed.

LORD MACNAGHTEN. My Lords, I agree with the judgment that has just been delivered by my noble and learned friend on the woolsack.

Your Lordships have heard a most able and exhaustive argument, in the course of which, if I am not mistaken, every known case bearing on the relative and respective rights of surface owners and the owners of the minerals beneath the surface was cited and discussed. But, after all, it must, I think, be taken that the law has been ascertained and settled beyond question by the more recent decisions in this House, of which it is only necessary to mention *Davis* v. *Treharne* (1), *Dixon* v. *White* (2), *Love* v. *Bell* (3), and *New Sharlston Collieries* v. *Earl of Westmorland.* (4)

The result seems to be that in all cases where there has been a severance in title and the upper and the lower strata are in different hands, the surface owner is entitled of common right to support for his property in its natural position and in its natural condition without interference or disturbance by or in consequence of mining operations, unless such interference or disturbance is authorized by the instrument of severance either in express terms or by necessary implication.

This presumption in favour of one of the ordinary and most necessary rights of property holds good whether the instrument of severance is a lease, or a deed of grant or reservation, or an inclosure Act or award. To exclude the presumption it is not enough that mining rights have been reserved or granted in the largest terms imaginable, or that powers and privileges usually found in mining grants are conferred without stint, or that compensation is provided in measure adequate or more than adequate to cover any damage likely to be occasioned by the exercise of those powers and privileges. Nor is it enough, in the case of a lease, that the lessee is bound to work out the minerals or to work the minerals in a prescribed manner, or, in the case of an inclosure Act or award, that the lord in whose favour the mines are reserved or regranted may be authorized to work the minerals and enjoy the property as fully and freely as if the inclosure Act had not been passed. The difficulty of applying such an hypothesis to the altered condition of things brought about by an inclosure Act has, as it seems to me, led this House

(1) (1881) 6 App. Cas. 460.
(2) (1883) 8 App. Cas. 833.
(3) 9 App. Cas. 286.
(4) [1904] 2 Ch. 443, n.

H. L. (E.) 1906

BUTTERKNOWLE COLLIERY COMPANY v. BISHOP AUCKLAND INDUSTRIAL CO-OPERATIVE COMPANY

Lord Macnaghten

to treat the provision in which it is found, and of which it would seem at first sight to be the keynote, as a dead letter for any practical purpose.

Although provision for compensation is not of itself sufficient to shew that the mine owner working in the usual and proper manner is at liberty to let down the surface, the absence of any provision for compensation is some indication that the ordinary rights of the surface owner were intended to be left untouched. On the other hand, the presence of a provision for compensation, which is obviously inadequate or plainly inappropriate if applied to damage by subsidence, is cogent evidence to prove that subsidence was not contemplated.

The only case in this House not altogether in harmony with recent decisions is *Duke of Buccleuch* v. *Wakefield*. (1) Whether all the refined and somewhat subtle distinctions which the noble and learned Lords who decided *Love* v. *Bell* (2) were able to discover between the Duke of Buccleuch's case and the case before them are, or are not, wholly satisfactory, the way in which the Duke of Buccleuch's case was treated shews that it must be regarded as standing by itself, and outside the line of authorities embodying and illustrating the law.

Such being, in my opinion, the state of the law at the present day, I do not propose to trouble your Lordships by any reference to cases in the Courts below preceding *Davis* v. *Treharne*. (3) They are certainly not all consistent with the law as now established. They have all been considered in this House. Each has had its due weight in contributing to the result. And it seems to me that a minute and over-careful study of cases where the language of the instrument to be construed is not quite the same, or where, if the language is the same, the decision is not binding on this House, is more likely to prove an embarrassment than any help to a right conclusion. I may, however, observe in passing that in my opinion the case of *Consett Waterworks Co.* v. *Ritson* (4), which was cited in the Courts below and in this House from the shorthand notes, can no longer be regarded as an authority.

(1) L. R. 4 H. L. 377.
(2) 9 App. Cas. 286.
(3) 6 App. Cas. 460.
(4) 22 Q. B. D. 318, 702.

In the present case the provision for compensation in the Act 31 Geo. 2, c. xxxii., is absurdly inappropriate if applied to injury or damage occasioned by letting down the surface. And there is nothing, as it seems to me, in the other provisions of the Act, construed by the light of the recent decisions of this House, tending to shew that injury by subsidence was in the contemplation of the parties concerned in the arrangement intended to be effected by the Act, or within the scope of the enactment.

I think the appeal fails, and ought to be dismissed with costs.

LORD DAVEY. My Lords, the general principles upon which questions of this kind are to be decided may be considered as settled. It cannot now be disputed that prima facie where the surface is in one owner and the minerals in another the latter cannot work the minerals so as to destroy the surface. This rule has been clearly enunciated in this House in the case of *New Sharlston Collieries Co.* v. *Earl of Westmorland* (1), but I do not know that it is better stated anywhere than in a case which is not often cited of *Roberts* v. *Haines*. (2)

If there is no provision for giving compensation for the injury done to the surface, it is almost conclusive that the common law rule was intended to apply. But it is not so clear that if there be a provision giving such compensation it is sufficient to exclude the common law rule. I see from the judgment of Vaughan Williams L.J. in the present case that I am supposed to have laid down new law on this point in the New Sharlston case. It was not my intention to do so, and I do not think that what I said bears that interpretation. I did not intend to say more than I understand to have been said by Lord Blackburn in *Davis* v. *Treharne*. (3) If the words mean that the owner of the coal may take away the whole coal, regardless of the consequences, on making compensation for the injury done, the law will give effect to such a bargain or enactment; but, as Lord Blackburn says, a clause saying that the coal owner shall make compensation for damage done to the surface does not itself afford a

(1) [1904] 2 Ch. 443, n. (2) (1856-7) 6 E. & B. 643; 7 E. & B. 625.
(3) 6 App. Cas. 460, at p. 467.

H. L. (E) 1906

BUTTERKNOWLE COLLIERY COMPANY v. BISHOP AUCKLAND INDUSTRIAL CO-OPERATIVE COMPANY.

Lord Davey.

strong argument for saying that he may destroy the surface, as there may be other injury to the surface in connection with the working of the coal to which the compensation will be applicable.

On the point now before your Lordships the cases run very fine, and the question for our decision must ultimately depend on the proper construction of the words of the statute. No doubt there is some difficulty in reconciling *Duke of Buccleuch* v. *Wakefield* (1) and *Love* v. *Bell* (2); but the words in the Acts in question in the two cases are not the same, and Lord Selborne in the latter case was able to distinguish them. I am prepared with your Lordships to follow the reasoning of Lord Selborne, and I think we ought to give judgment for the respondents.

Lord Robertson. My Lords, I have had the opportunity of reading and considering the judgments of the Lord Chancellor and Lord Atkinson, and I agree with them.

Lord Atkinson. My Lords, the question for decision in this appeal turns upon the construction of certain provisions in the Act 31 Geo. 2, c. xxxii., under which the moors and commons in the chapelry of Hamsterley, in the manor of Wolsingham, in the county of Durham, containing about 7000 acres, then belonging to the Bishop of Durham, were enclosed. In the preamble of the statute it is recited that certain freeholders and copyholders, therein named, of lands within four specified townships situate within the manor, their trustees, lessees, farmers, and tenants, had, in respect of or as appurtenants to their lands and tenements, a right of common over these lands, and that, being desirous to improve their properties in the townships and also that these common or waste grounds might be cultivated, improved, and rendered of some use and value, had agreed, with the consent of the lord of the manor, that the wastes should be enclosed and allotted and divided amongst the several persons entitled to the right of common.

Under the provisions of the statute the right of common is extinguished. Certain roads and drains and works apparently

(1) L. R. 4 H. L. 377. (2) 9 App. Cas. 289.

for common or public benefit are directed to be made and carried out by the Commissioners appointed under it, and the land itself directed to be divided amongst the owners of farms, mills, houses, or cottages without any land belonging thereto, in certain proportions therein mentioned, to be held by the respective allottees on the same tenure as the land or premises theretofore held by them, power being expressly conferred on the allottees to quarry stone upon the moor for the purpose of erecting upon the portions allotted such buildings as might be required. The lands in question in this action are portion of those allotted to one Christopher Jackson, the predecessor in title of the plaintiffs.

It can scarcely be doubted that all the parties to the arrangement upon which the Act was founded contemplated at the time that the allotted lands should be used for the purpose of agriculture; but no restriction whatever is placed upon the use to which they might be devoted. The allottees would have been quite within their right in erecting factories, cottages, or other houses, as well as farm buildings, upon them.

There is no controversy as to some of the general principles of law which, according to the modern authorities, are applicable to the case.

It is admitted that the owner of mines and minerals, whether under an inclosure Act such as this or by grant or reservation under a deed, has prima facie, as against those having an estate or interest in the surface of the land, the right properly and without negligence to search for, work, and win those minerals, provided he does not thereby let down the surface to the injury and damage of the last-named persons.

It is further admitted that the owner of the surface has, by common law, the prima facie right to have the surface supported by the subjacent soil, and that statutes such as that under consideration, as well as deeds granting or reserving the right to mines and minerals as distinct from the ownership of or right to the possession and enjoyment of the surface, must be construed upon the principle that this right to support can only be taken away by the express words of the statute or deed or by necessary implication from the language used in them.

Such difficulty as may present itself in dealing with any given

H. L. (E.) 1906

BUTTERKNOWLE COLLIERY COMPANY v. BISHOP AUCKLAND INDUSTRIAL CO-OPERATIVE COMPANY.

Lord Atkinson.

case of the present kind consists in the application of these general principles to the facts of the particular case. The existence in any inclosure Act of any clause providing for compensation for the damage caused by subsidence, the adequacy or inadequacy of that compensation, and the person or class of persons by whom it is to be paid, have always been regarded as guides to the true construction of the statute. In *Smith* v. *Darby* (1) Lush J. deals with the question in the words following (2): "And if to that grant (the grant of the mines and minerals) be superadded provisions for compensation for damage done to the surface, if the words giving compensation can be fairly satisfied by reference to acts done on the surface, though they may be large enough to extend to damage done to the surface by taking away support, still they must be read as confined to acts done on the surface, the presumption being that the grantor did not intend to enable the grantee of the minerals to take away the support from the surface soil."

The judgment of Lord Blackburn in *Davis* v. *Treharne* (3), approved of by Lord Selborne in *Love* v. *Bell* (4), supports this view. In the former case it was held that the words "do and execute all such acts, works, and things in or under or above the said premises as shall be necessary or convenient for working and carrying away the same (the minerals), he or they (the lessor his heirs and assigns) making all reasonable compensation to Thomas (the lessee of the surface), his assigns, &c., for all damage occasioned by the exercise of the rights hereby reserved," did not justify the letting down of the surface.

There are not in the statute on which this case depends any words amounting, in effect, to a licence to the lord of the manor to work the mines so as to cause the surface to subside, such as were found in *Rowbotham* v. *Wilson* (5), and it is not disputed that, before the inclosure, the lord of the manor was under an obligation to abstain from working and winning the mines and minerals in such a way as to cause injury and damage to the commoners' rights of pasturage.

(1) L. R. 7 Q. B. 716.
(2) Ibid. 726.
(3) 6 App. Cas. 466.
(4) 9 App. Cas. 289.
(5) (1860) 8 H. L. C. 348.

It was not, as I understood, contended, and in my opinion could not be contended successfully, that the liability for damages from which the lord is relieved in this case by the words (so much relied upon by the appellants) "without paying any compensation for so doing" is not commensurate with the liability, in the clause immediately succeeding, thrown in each township upon the occupiers of the allotted lands. It is, I think, clear that the liability for damages is transferred, but the amount of the damages recoverable is neither increased nor diminished.

And, of course, just as in *Love* v. *Bell* (1) the fact that the persons in possession of the allotted lands were the only persons to receive compensation for any injury done to the surface was treated as a vital matter for consideration in arriving at a true construction of the statute on which that case depended, so here, the fact that the occupiers of the allotted lands are made responsible for the damage caused by the acts of the lord of the manor, over whom they have no control, and are to the exclusion of the owners and lessees under whom they may claim, and irrespective of the nature of their tenure, or the quantum or value of their interest in the lands they occupy, bound to pay, and entitled to receive, compensation for the injury the lord may cause, must be treated as a circumstance affording much assistance in arriving at a conclusion as to what was, at the time the statute was passed, in the contemplation of the several parties to the arrangement it embodies and was designed to carry out.

I agree with the appellants' counsel that the clause of the statute dealing with this matter cannot be disintegrated into distinct sentences, words, or phrases, and each construed separately and independently of the other. The clause must be considered as a whole.

There are, it appears to me, three possible constructions of which it is susceptible, and only three. It may mean: First, that the lord had over the allotted lands rights in respect to minerals equal to those he enjoyed before the inclosure, namely, the right to let down the surface to any extent not injurious to the right of pasturage to which the commoners were then entitled; secondly, that the extensive right of the lord before

(1) 9 App. Cas. 289.

H. L. (E.) 1906 — BUTTERKNOWLE COLLIERY COMPANY v. BISHOP AUCKLAND INDUSTRIAL CO-OPERATIVE COMPANY. — Lord Atkinson.

inclosure is, by force of the words "without paying compensation for so doing," enlarged into an absolute right to let down the entire surface without any regard to or liability for the damage he may thereby cause; thirdly, that the lord is not entitled to work the mines so as to let down the surface to the prejudice of any person having an estate or interest in the surface.

The words "as fully and freely as he or they might or could have enjoyed the same in case this Act had not been made" were relied upon in support of the first construction. Words of this character, or to this effect, have been frequently considered, especially in the cases of *Duke of Buccleuch* v. *Wakefield* (1) and *Love* v. *Bell.* (2) In each of these cases it was held that they could not receive a construction such as that here contended for. In the latter case Lord Selborne expresses himself thus: "As pointed out in the case referred to at the Bar, *Duke of Buccleuch* v. *Wakefield* (1), it is impossible to understand such words as reserving the previous rights of working exactly as they were without reference to the fact that an inclosure had been made, and as if rights of common still continued to exist, and the rights of working were still subject to the rights of common. The right given by those words must, in that respect, although it is still a right to be held and enjoyed in a full, ample, and beneficial manner, nevertheless be a right to be held and enjoyed by the lord after inclosure and against the owners of allotments and no longer as against commoners."

It is difficult to suppose that it could have been intended to reserve to the lord in this case the power to take away or render useless the new and extended rights for good consideration conferred upon the allottees. And just as the principle of "Sic utere tuo ut alienum non lædas" was applied before inclosure to protect from injury or encroachment the comparatively meagre rights of the commoners, so now, as far as these words are concerned, may the same principle be applied to protect from injury or encroachment the enlarged and substituted rights of the allottees. As the rights of the commoners have been enlarged

(1) L. R. 4 H. L. 396. (2) 9 App. Cas. 286.

into those of the allottees, so must it, I think, be taken that the obligation of the lord to respect those new rights has been enlarged correspondingly.

In the face of the above-mentioned authorities, the first construction cannot, in my opinion, be sustained.

In support of the second construction, much reliance was placed on the words "without paying any satisfaction for so doing." And six authorities, beginning with *Blackett* v. *Bradley* (1) and ending with *Williams* v. *Bagnall* (2), were cited to shew that, wherever these words or similar words occur, the case has, owing, I presume, to their presence, been decided in favour of the right of the lord to let down the surface.

On examination of these cases, however, it will be found that no such force and effect as is suggested has been given to words by themselves, but that special facts existed in each case to account for the decision.

The case of *Blackett* v. *Bradley* (1) was decided on demurrer. The present inclosure Act was there under consideration. The defendant representing the mine owner did not, as in this case, rely upon the statute alone, but averred in his plea that there existed from time immemorial a local custom under which he was entitled to let down the surface, and the plea was decided to be bad because the custom relied upon was held to be unreasonable.

In *Gill* v. *Dickinson* (3), which was also decided on demurrer, the mine owner succeeded, not because of the effect of these words per se, or because of their effect taken in connection with the words "he might work the mines as freely and as fully as if this Act had not been made" which immediately preceded them, but because the defence contained an averment, accepted, of course, on demurrer, as true, that the lord of the manor had from time immemorial been accustomed to work the mines under the wastes without leaving sufficient support for the surface, and without making any compensation for the injury caused thereby, to which practice the words first mentioned were held to have necessarily referred.

(1) 1 B. & S. 940. (2) (1867) 15 W. R. 272.
(3) 5 Q. B. D. 159.

H. L. (E.)
1906
BUTTERKNOWLE COLLIERY COMPANY v. BISHOP AUCKLAND INDUSTRIAL CO-OPERATIVE COMPANY.
Lord Atkinson.

In *Buchanan* v. *Andrew* (1) it was expressly provided in the feu contracts that the superior "should not be liable for any damage which might happen to the land or buildings thereon, by the working of the minerals under the same, or in the neighbourhood thereof, under the long wall working or otherwise"; but it was conceded that under this system of working no support is, in the course of working, left for the surface except such as might be supplied by rubbish accumulated in the spaces from which the coal had been taken, a support admittedly insufficient to prevent subsidence.

In *Bell* v. *Lord Dudley* (2) the coal had been worked for 200 years. The working had caused subsidence of the surface. It was proved to be impracticable to work the existing seam of coal, thirty feet in thickness, without causing subsidence. The compensation was to be paid by the allottees of the lands, of whom Lord Dudley, the defendant, was one, not, as here, by the persons merely in occupation of them, and the statute of inclosure gave to the lord power "to do all such reasonable and necessary acts and things for working, winning, and disposing of the coal, as he or they shall think proper, without any molestation or interruption to any person or persons whatsoever, without making any satisfaction for any damage that may be done thereby, he and they (his heirs and assigns) doing as little damage as may be." The Act was naturally construed with regard to the practice which had so long prevailed, and to the results necessarily arising in the working from the very nature of the subject-matter.

In *Consett Waterworks Co.* v. *Ritson* (3) the decision turned upon the construction of an inclosure Act of 1773 (13 Geo. 3, c. lxvii.), under which the common and waste lands of the manor of Lanchester, belonging to the Bishop of Durham, were enclosed. In the Queen's Bench Division judgment was given against the defendant, claiming under the lord of the manor the right to let down the surface. The Court of Appeal reversed that decision, and gave judgment in the defendant's favour, on the ground that the lord was, under the words of the Act, entitled to

(1) L. R. 2 H. L. Sc. 286. (2) [1895] 1 Ch. 182.
(3) 22 Q. B. D. 318, 702.

let down the surface; but the words of s. 45 of this statute are, I think, stronger in favour of the lord's right than those relied upon in the present case. And, moreover, two material provisions distinguish the 13 Geo. 3, c. lxvii., from the inclosure Act now under consideration: First, in the former a fund is set apart for the payment of damages; secondly, if that fund prove insufficient the deficit is to be made up by the owners or occupiers of the allotted lands, but every occupier or tenant who pays such damages can deduct from his rent the sum he is obliged to pay, so that, in the result, the deficit is paid by the owners, not by the tenants, nor by those occupiers who are not owners.

It may well be that the allottees of the land enclosed may in many cases by the very inclosure itself have received from the lord of the manor a benefit sufficient to recompense them for taking upon themselves, under a kind of mutual insurance system, the liability for the damages caused by their benefactor or those claiming under him; but it is obvious that this consideration does not apply to occupiers as distinct from owners. They receive no benefit whatever from the lord of the manor.

In *Williams* v. *Bagnall* (1) no right was conferred on the person who was to work the mines to enter upon the surface at all. The mines were to be worked from adjoining lands, and the clause exempting this person from damage must almost necessarily be held to apply to damage caused by subsidence, since that was the only kind of damage to the surface which could in all probability be caused.

All these cases were decided on their own special facts, which were in each instance more favourable to the claim of the lord of the manor than are the facts of this case. They by no means support the contention that the presence in the statute of words exempting the lord from liability for damages for his own acts per se strengthen his position to the extent suggested; while on the other hand it may be pointed out that the presence in the inclosure Act, under discussion in the *Duke of Buccleuch* v.

(1) 15 W. R. 272.

H. L. (E.) 1906

BUTTERKNOWLE COLLIERY COMPANY v. BISHOP AUCKLAND INDUSTRIAL CO-OPERATIVE COMPANY.

Lord Atkinson.

Wakefield (1), of a provision by which the lord of the manor was bound to make full compensation for the damage caused by his own acts, was by Mellish L.J. in *Hext* v. *Gill* (2) and by Lord Watson in *Love* v. *Bell* (3) considered to be the special feature on which the decision in favour of the lord in that case turned.

The words of the clause dealing with the working of the mines in this case are general in their character. They are "searching for, winning and working the said mines and quarries within and under their respective allotments." No details are given as to the mode in which, or the degree to which, the mines are to be worked or the minerals won, nor is any particular operation indicated which would necessarily cause subsidence.

The words "and under" in this connection can no more, in my opinion, imply that the parties contemplated such underground working as might let down the surface than the words "or under" were considered by Lord Selborne to imply that in the case of *Davis* v. *Treharne*. (4)

After the words above set forth appearing in the clause here under consideration, there follows an enumeration of several operations, each of which would almost necessarily cause some injury to the surface. It may be that the words of this part of the clause are, as is contended, susceptible of a construction extending to injury to the surface by subsidence. They are, however, in my opinion, equally susceptible of the more limited construction which would exclude injury of that character, while the whole provision in reference to compensation points to the latter construction as the more just and reasonable of the two. But if the clause be susceptible of these two constructions, then the more limited of the two, namely, that which preserves to the owners of the surface the right to the support to which they are by the common law entitled, must be preferred. I accordingly think that the second of these three possible constructions is as inadmissible as the first, and that the third must be adopted—that, therefore, the judgment appealed

(1) L. R. 4 H. L. 377.
(2) (1872) L. R. 7 Ch. 699.
(3) 9 App. Cas. 286.
(4) 6 App. Cas. 460.

from was right, and that this appeal should be dismissed with costs.

Order of the Court of Appeal affirmed, and appeal dismissed with costs.

Lords' Journals, May 7, 1906.

Solicitors: *Milles, Jennings, White & Foster; Meredith, Roberts & Mills.*

H. L. (E.) 1906

BUTTERKNOWLE COLLIERY COMPANY, *v.* BISHOP AUCKLAND INDUSTRIAL CO-OPERATIVE COMPANY.

[HOUSE OF LORDS.]

BACK (PAUPER) . . . . . APPELLANT;

AND

DICK KERR & CO., LIMITED . . . . . RESPONDENTS.

H. L. (E.) 1906

May 15.

Employer and Workman—Employment "on or in or about an Engineering Work"—Work ancillary to Engineering Work—Workmen's Compensation Act, 1897 (60 & 61 *Vict. c.* 37), *s.* 7.

A workman in the service of the respondents, who had contracted to take up the rails of horse tramways in a town and lay down rails for electric tramways, while employed in unloading and stacking rails for the new tramways in a railway yard was injured by an accident. The rails had been brought by the railway, and the contractors were allowed by the railway company to use the yard for the storage of the rails till they were required for the tramways. At the time of the accident the only work then begun under the contract was the taking up rails in a street about 700 yards from the railway yard:—

Held, by Lords Davey, Robertson, and Atkinson (Lord Loreburn L.C. and Lord James dissenting), that the workman was not at the time of the accident employed "on or in or about an engineering work" within the meaning of the Workmen's Compensation Act, 1897, s. 7.

The decision of the Court of Appeal, [1905] 2 K. B. 148, affirmed.

THE respondents had contracted to take up the rails of certain horse tramways in Exeter and lay down new rails for tramways to be worked by electric power. The new rails were brought by the London and South Western Railway to their yard at Queen Street Station. By arrangement with the company the respondents were allowed to stack some of the rails in that yard till they were required for the new tramways, one of which ran along Queen

H. L. (E.) 1906 BACK v. DICK KERR & CO., LIMITED.

Street. While unloading and stacking these rails the appellant, a workman in the employ of the respondents, was injured by an accident arising out of that employment. At the time of the accident the only work then begun under the contract was the taking up of the rails of an old tramway about 700 yards from the railway yard. At the hearing of the claim for compensation it was contended for the respondents that "engineering work" in the Workmen's Compensation Act, 1897, s. 7, imported definite locality, and that the engineering work here in question must be limited to the portion of the line in course of construction, and could not include storing places. The county court judge held that the words "on or in or about an engineering work" must include "any portion of the selected area upon which the essential operations were conducted." He found that the site upon which the rails were stacked in the yard was "on or in or about an engineering work," and that the respondents were therefore liable to make compensation. The Court of Appeal (Collins M.R., Mathew and Cozens-Hardy L.JJ.) reversed this decision.

May 14. *Gutteridge* (*Hemmant* with him), for the appellant. A tramway is a "railroad" within the definition of "engineering work" in the Workmen's Compensation Act, 1897, s. 7: *Fletcher* v. *United London Tramways.* (1) The test of employment "on or in or about an engineering work" is not the geographical area, but the nature of the work: *Middlemiss* v. *Berwickshire County Council.* (2) There the driver of a watercart, who was injured while employed in watering a section of the road at a distance from the steam-roller, was held to have been employed "on or in or about an engineering work"; so in *Rogers* v. *Cardiff Corporation* (3), where a man was thrown from a tower-waggon while on his way to repair overhead wires at a point three-quarters of a mile from the place of the accident. *Atkinson* v. *Lumb* (4) is a strong decision to the same effect. No doubt there are decisions to the contrary effect; but, whatever the test may be, the question whether the work was part of an engineering work is one of fact, and here the county court judge has found the fact in favour

(1) [1902] 2 K. B. 269.
(2) (1900) 2 F. 392.
(3) [1905] 2 K. B. 832.
(4) [1903] 1 K. B. 861.

of the appellant. The word "about" may be construed either as contiguous to or as in connection with; it is an enlarging word: *Powell* v. *Brown*. (1) The decisions on factories are not conclusive. A factory has an area physically defined. Different considerations apply to engineering work; the area is usually more extensive and scattered—often undefined and sometimes undefinable.

Ruegg, K.C., and *W. Shakespeare*, for the respondents. The Act was intended to protect certain classes of workpeople within an ascertained area. Six cases are specified in s. 7, sub-s. 1, to which the Act is to apply, and in all these the accident must be on or in or about the area: *Fenn* v. *Miller*. (2) Both in the case of a factory and engineering work the fundamental idea is of a protected area, and "about" has never been construed as meaning "concerned with." The theory of a physical area has always been adopted by the Court of Appeal: see *Chambers* v. *Whitehaven Harbour Commissioners*. (3) In *Francis* v. *Turner Brothers* (4) it was held that a workman, sent by his employer to another person's factory where he was injured, was not entitled to compensation. This decision was approved and followed by this House in *Wrigley* v. *Whittaker & Sons*. (5) The local principle was still more narrowly applied in *Houlder Line, Ld.* v. *Griffin*. (6) In engineering work it is no doubt more difficult to say what is its area than to say what is not its area, but unloading and stacking rails is certainly not engineering work.

Gutteridge, in reply. Assuming the physical area to be the test, it is not limited to the place where the principal work is in progress: it is in its nature shifting from one place to another. It must cover places where (as in the present case) any essential part of the work is being carried on.

Lord Loreburn L.C. My Lords, I should always have misgivings in differing from the conclusions of the Court of Appeal,

(1) [1899] 1 Q. B. 157, per A. L. Smith L.J.
(2) [1900] 1 Q. B. 788.
(3) [1899] 2 Q. B. 132.
(4) [1900] 1 Q. B. 478.
(5) [1902] A. C. 299.
(6) [1905] A. C. 220.

H. L. (E.) 1906 BACK v. DICK KERR & CO., LIMITED. Lord Loreburn L.C.

and those misgivings are doubled when I find myself differing also from the majority of your Lordships' House; but I must say that the argument of the learned counsel for the appellant —an argument of conspicuous ability—has led me to be of opinion that this appeal ought to be allowed.

In this case a horse tramway system was being converted into an electrical tramway system; and that is an engineering work within the meaning of the Workmen's Compensation Act. Within a few yards of one of the lines of rail there is a railway yard, part of which, by arrangement, was appropriated to stacking rails for use in this work. In unloading there some of the rails the applicant was injured. The learned county court judge found that he was injured "on or in or about" the "engineering work" referred to. The Court of Appeal held that there was no evidence of that. I cannot myself think, as a matter of law, that this stacking ground was not a part of the engineering work. The county court judge found that it was, and I think it was a matter of fact which he was entitled so to find. That is the ground upon which my view is based.

I would only add two observations. I agree that when the 7th section of the Act speaks of an employment being "on or in or about" an "engineering work" it means, as in the case of a factory, "on or in or about" some place, that is to say, the place or places where the "engineering work" is carried on. The other observation I have to make is that in my view the 7th section prescribes the character of the employment in which a man must be employed, if he is to come within this Act. When that is ascertained, you must ascertain whether the accident "arises out of and in the course of" such employment, as is pointed out by the 1st section of the Act.

I am myself of opinion that this judgment of the Court of Appeal ought to be reversed, but inasmuch as the view, I believe, of the majority of your Lordships is otherwise, the appeal will be dismissed.

LORD DAVEY. My Lords, it has been decided by a series of cases in the Court of Appeal, with some support in this House, that the words "engineering work" in s. 7, sub-s. 1, of the Workmen's

Compensation Act, 1897, is to be construed as defining the locality within which the workman must be employed in order to give him a right to compensation under the Act, as well as the character of the employment. This construction receives some support from the provisions of s. 7, sub-s. 3, and I am not prepared to say it is wrong. The question, therefore, is whether the appellant was employed "on or in or about" an area in which an "engineering work" as defined by sub-s. 2 was being carried on when he met with his accident. There is no doubt that the conversion or extension of the tramways on which his employers were engaged was an "engineering work" within the definition, "railroad" having been decided to include "tramway," and the question divides itself into two branches: (1.) Was the station yard within which the rails were being stacked for the time being made part of the area on or in which the "engineering work" was being carried on; or (2.) was the station yard within such proximity to the engineering work that the employment there may properly be said to be "about" the engineering work within the meaning of the section?

In answer to the first question, I am of opinion that the work of stacking the rails cannot properly be described as "engineering work" within the definition. It may be said to be preparatory or ancillary to it, but not, I think, a part of it. The appellant was employed in unloading the truck and stacking the rails in the station yard by the licence of the railway company, but the rails might as well have been loaded in a cart and hauled to the "work," or they might have been stacked at the ironworks where they were made until they were required for use.

Nor do I think the employment can properly be said to be "about" the engineering work. I do not think this is a mere question of comparative proximity. It is difficult to give any very definite meaning to this word, and I doubt whether it adds anything to the description which the Court would not have included by construction. I can, however, imagine a case where the man might actually be outside the ambit of the "railway, factory, mine, quarry, engineering work," or building, but assisting in an operation carried on within the ambit. At any rate I do not think that in this case a county court judge could

H. L. (E.) 1906 BACK v. DICK KERR & CO., LIMITED. Lord Davey.

properly find that the accident took place in the course of an employment about the locality of the engineering work.

The decisions on this Act inevitably lead to results which must appear arbitrary and capricious. It is hard for those who suffer to understand why some accidents give a right to compensation and others do not. The Act does not pretend to logical consistency, and perhaps it was too much to expect that a tentative experiment, such as this Act was, should attain it.

I am of opinion, though I confess I express it with some regret, that this appeal fails and should be dismissed, and I move your Lordships accordingly.

LORD JAMES. My Lords, I concur in the judgment of my noble and learned friend the Lord Chancellor.

It seems to me that upon these facts it was well within the competency of the learned county court judge, as a matter of law, to find that the accident occurred "on or in or about" an "engineering work." I do not think that the "engineering work" need be, if I may use the term, the headquarters of the undertaker; it may be a work, no doubt with a limited physical area, but apart from the place where he carries on the main part of his business. If that construction be right it then became a question of fact whether, in the circumstances of this case, this was an accident occurring "on or in or about" an "engineering work." The learned county court judge has so found, and I do not think there is material enough here to cause your Lordships to differ from that finding.

My Lords, I would add that I do not quite follow the view that my noble and learned friend on the woolsack has expressed in relation to limiting "engineering work" to the definition of a physical area, as in the case of a factory. There has been, so far as I know, no direct authority in this House that an "engineering work" means a physical area. Of course I am aware there have been decisions of the Court of Appeal to that effect in relation to factories, and there is a direct judgment in *Wrigley* v. *Whittaker* (1) with reference to a factory. It may be that that judgment was intended to cover an "engineering

(1) [1902] A. C. 299.

work," but it does not say so in terms. That judgment does not decide whether the statute when it speaks of "engineering work" means a physical area. I think there is a great deal to be said to shew that it does not, and that the case of an "engineering work" differs from a factory, which was undoubtedly considered to be an undertaking within a physical area. The reason of that difference is that "engineering work" has a definition which leads us away from the physical area, which does not apply to the case of a factory or to the other works mentioned in s. 7.

But if this case is to be determined on the ground that the county court judge was not entitled to find that where the injury occurred was "on or in or about" an "engineering work" as a matter of fact, the consideration of the second point becomes somewhat academic. I only express my doubt whether the view which my noble and learned friend on the woolsack has stated has yet been determined to be correct.

LORD ROBERTSON. My Lords, I hold that when the statute uses the words "on or in or about" an "engineering work," the "work" spoken of is something having geographical boundaries. It was not, in the end, disputed at the Bar that this is so in the case of a factory and the other things mentioned side by side with factory and "engineering work," and to which, in common with "engineering work," the propositions of locality "on or in or about" are made to apply. How, then, the word (for instance) "about" can apply to the words "engineering work" except those words connote some place, I do not see, unless, indeed, the word "about" is used in a shifting sense, and when applied to engineering work is turned into the sense of "concerning" or "relating to." This is clearly untenable. I think that the decision of this House on a case about a factory is equally applicable to that now before your Lordships on the associated term "engineering work."

It must, however, I think, be conceded to the appellant that ascertaining the geographical limits of an engineering work is not nearly so easy as ascertaining, e.g., the geographical limits of a factory. In the case of an engineering work, such as the repairing a tramway, you deal not with a place set apart for

H. L. (E.) 1906 BACK v. DICK KERR & Co., LIMITED. Lord Robertson.

the particular business like a factory, but with, to begin with, some part or parts of an open street; and it is only by the user actually made by the undertakers that you find out the "engineering work." Accordingly, I accede to the appellant's argument thus far, that it is a question of fact whether the use made of it by the undertaker has constituted the place in dispute a part of the "engineering work." Again, I think it is quite fallacious to say that because one particular place is ascertained to be a locus of engineering work, no other place can be held to be also such a locus of the same work.

The view of the arbitrator seems to me sound enough in so far as he proceeds to consider whether this part of the railway ground was not part of the "engineering work" as well as the street where operations were proceeding. But where I think the arbitrator goes wrong is in holding that in fact this place at the railway was one where "engineering work" was being carried on. I think he has exaggerated the importance of the "stacking" at the railway station. This place prima facie is the seat of railway and not of engineering operations; and therefore we require some distinctively engineering operation as distinguished from work incident to transit. If this man had simply carted the rails from the station an accident in the station would not have been an accident "on or in or about" the "engineering work." Now, does the mere circumstance that instead of the rails being taken cartload by cartload from station to street it was found convenient to stack them make the railway station the locus of engineering work? I think not. The undertakers of the "engineering work" were at the railway station as customers of the railway company; and the stacking was merely an operation similar to leaving smaller articles at the left-luggage office. It was not in any sense distinctively "engineering work." What the county court judge says about the operations being essential is accurate in the same sense in which the operation of simply taking delivery of the rails is essential, the essentiality being that of the rails. If, then, the railway yard was not part of the "engineering work" the appellant fails, for the seat of the work in the street is too remote to admit of the application of the word "about."

I think the judgment appealed from should be affirmed.

LORD ATKINSON. My Lords, as I find that I differ from some of my noble and learned friends, I naturally entertain the opinion I have formed with considerable doubt.

The question for decision in this appeal is whether there was evidence before the county court judge on which he could legitimately find that the appellant was, at the time of the accident in respect of which he claims compensation, employed "on or in or about" an "engineering work" within the meaning of the 7th section of the Workmen's Compensation Act of 1897. The appellant was, when the accident occurred, engaged for his employers, the respondents, in stacking in the yard of the London and South Western Railway at Exeter certain rails consigned to those employers and there delivered to them. These rails were obtained in order that they might be used in certain work which the employer had contracted to execute and was actually engaged in executing, namely, the tearing up of the old rails of a tramway laid in Exeter worked by horse power, and replacing them by rails to be used for an electric tramway to be laid down from St. David's Station to the Clock Tower and along Queen Street. The place where the accident occurred was fifty yards distant from the Clock Tower and 700 yards distant from the nearest point at which the work of ripping up of the old line of rails was then being carried on. But the yard abutted upon Queen Street, was only separated from it by a gateway, and the projected works, if carried out completely as proposed, would at some portion of the progress have been actually carried on in close proximity to this yard.

Our attention has been called to authorities, including *Wrigley* v. *Whittaker* (1), decided in this House. The view of this statute apparently taken in all these cases was that the Legislature had intended to select certain fields of operation in which, owing to the nature of the work done there, danger to the workmen employed in doing it might be supposed to exist, and to confine the benefits conferred by the statute to injuries sustained in those physical areas or in close proximity to them. And accordingly these cases seem to have established that it is necessary in order to satisfy the words of s. 7, to hold that the employment

(1) [1902] A. C. 299.

H. L. (E.) 1906 BACK v. DICK KERR & Co., LIMITED. Lord Atkinson.

in which the workman must be engaged in order to entitle him to recover must be carried on in some defined or ascertainable physical area and that at the time of the accident he must have been working "on or in or about" that area, the word "about" being held to be equivalent at best to "in close proximity to." In *Wrigley* v. *Whittaker* (1) the workman was admittedly at the time of the accident engaged in doing his employer's business, namely, erecting in the factory of a certain company a wheel forged in his employer's factory, and by his employer contracted to be put up in the factory in which it was being placed when the accident occurred. Yet the workman was held not to be entitled to compensation, though it was not questioned that if a similar accident had happened to him before the wheel left his employer's factory he would have been so entitled.

Whether these decisions are sound or unsound—whether they lead or do not lead to irrational results—it is almost too late to inquire. The principle underlying them must now, I think, be taken to be firmly established, and the test laid down by them must be applied. To disturb them would cause the utmost confusion and perplexity, and, moreover, the Act is so worded that if the test thus stated were rejected it would be difficult to see what other could be adopted. I assume, therefore, for the purposes of this case that the "engineering work" in which the appellant must have been engaged, if he is to recover, must be work confined to some physical area, and that he must, when injured, have been working "on or in or about" that area. It is obvious, however, that difficulties arise in ascertaining what is the extent and what are the limits of the area of an engineering work which do not arise in the case of factories, docks, &c. In these latter cases the walls or fences built around the factory or dock, as the case may be, fix the boundaries and determine the area. In the cases such as those first mentioned there is no structural boundary. The area cannot, I think, be confined to the soil on which the rails are actually laid, nor in all cases to the street through which the tramway runs, nor even to the premises immediately abutting upon that street. The area

(1) [1902] A. C. 299.

must, I think, in the case of railroad or tramway or other undertaking of that sort, be fixed by user, that is to say, by the carrying on of some portion of the general operation of construction, alteration, or repair which the employer is engaged in carrying out. In the construction of such a huge undertaking as the Tay Bridge, for instance, various difficult and dangerous operations, all in character "engineering work" and each leading up to the accomplishment of the ultimate object, the construction of the bridge, must be carried on over a widely extended area. It would, in my opinion, be irrational to hold that the entire area so occupied, whether it be continuous or composed of several separated smaller areas, was not an area of "engineering work," and if I could come to the conclusion that the stacking of the rails in the railway yard in this case could in any sense be regarded as part or portion of the general engineering operation the respondents were employed to carry out, I should be inclined to hold that the appellant was at the time of the accident employed "on or in or about" an "engineering work," and that the yard of the railway company was an area of "engineering work." But in my opinion the stacking of the rails in the yard was only a mode of accepting delivery of them, and was no more a part or portion of the engineering operations than was the dispatch of the rails from the place at which they were loaded.

I am therefore of opinion that the appellant was not engaged on an "engineering work," and that the railway yard was not the area of an "engineering work" or portion of that area or about or in close proximity to such an area. I therefore think that the decision of the Court of Appeal was right, and that the appeal should be dismissed.

Order of the Court of Appeal affirmed and appeal dismissed.

Lords' Journals, May 15, 1906.

Solicitors: *Baylis, Pearce & Co., for Dunn & Baker, Exeter; William Hurd & Son, for Ford, Harris & Ford, Exeter.*

[HOUSE OF LORDS.]

H. L. (E.) 1906 *May* 21.

BOSTON FRUIT COMPANY . . . . . Appellants;

AND

BRITISH AND FOREIGN MARINE INSURANCE COMPANY, LIMITED . . . . . Respondents.

Marine Insurance—Policy effected by Owner of Ship for all Persons to whom the Subject-matter might appertain—Intention of Owner—Right of Charterer to Benefit of Policy—Ratification.

The appellants chartered a ship from the owners. Brokers, instructed by the owners' agents, effected with the respondents a policy of insurance on the ship, "as well in their own name as for and in the name and names of all and every other person or persons to whom the subject-matter of this policy does may or shall appertain in part or in all." The policy contained a collision clause. The appellants, having been compelled to pay damages to the owners of another vessel for a collision between the two ships, sued the respondents on the policy. There being no evidence of any intention by the owners to insure on behalf of the appellants:—

Held, that the appellants were not entitled to sue on the policy.

The decision of the Court of Appeal, [1905] 1 K. B. 637, affirmed.

The appellants having brought an action against the respondents under the circumstances stated in the judgments of Lord Loreburn L.C. and Lord Macnaghten, Bigham J. entered judgment for the defendants, and this decision was affirmed by the Court of Appeal (Vaughan Williams, Romer, and Stirling L.JJ.).

Feb. 23, 26, 27; March 1. *Carver, K.C.*, and *A. Llewellyn Davies*, for the appellants. The policy was effected to cover, and did cover, the charterers as well as the owners. The charterers were at risk, and the only persons at risk, in case of collision; the owners were not at risk. Therefore, if the charterers were not covered no one was. The references in the charterparty to insurance shew that it was intended by the owners as well as the charterers that the insurance should cover the charterers. It is manifest that it did not mean that the charterers should take out a separate policy and pay for it themselves. It is not disputed that the words are wide enough to cover the charterers. The broker may not have

intended to cover the charterers, but that is immaterial: 2 Duer, Lect. 9, pp. 37, 38. The owners were bound to do so, and that is enough. In pursuance of the charterparty the agents for the owners instructed brokers to insure, and must be taken to have intended that the policy should cover the charterers. Where the intention exists to embrace the interests of any person who may be concerned, any such person may by adopting the policy obtain the benefit of it: *Routh* v. *Thompson* (1); *Keighley, Maxsted & Co.* v. *Durant* (2); and the cases relied on by the appellants in the Courts below. But intention is not necessary; it is enough if the person adopting the policy was at the time capable of being ascertained. The text-books do not always agree with one another or with themselves on this subject: see 1 Arnould on Marine Insurance, 7th ed. ss. 143, 173, where the rule is stated in two inconsistent ways; and see 2 Duer, Lect. 10, s. 21, p. 135.

Scrutton, K.C., and *J. A. Hamilton, K.C.* (*Maurice Hill* with them), for the respondents. There was no evidence that the owners effected the policy, or intended to effect it, on behalf of the charterers. Upon the true construction of the charterparty it was not contemplated that the charterers would insure; the inference from the wording of the clauses is the other way. But even if it had been contemplated or expressly provided for in the charterparty, that would not make the underwriters liable; they were not parties to the charterparty or privy to it. The onus of proof lies on the charterers, and there is no evidence forthcoming. The charterers themselves have put the matter beyond doubt by their allegation and contention in the American proceedings that they had no interest in the policy; and they were right. Can anyone suppose that the owners intended to insure the charterers and pay the premium themselves? There could be no ratification of the policy by the charterers unless there was an intention on the part of the owners or their agents or brokers to effect it on behalf of the charterers: *Watson* v. *Swann*. (3) No person can ratify who is not contemplated by the policy: 1 Phillips on Marine Insurance, 3rd ed. ch. 4,

(1) (1811) 13 East, 274. (2) [1901] A. C. 240, 246.
(3) (1862) 11 C. B. (N.S.) 756, 771.

H. L. (E.) 1906 — BOSTON FRUIT COMPANY v. BRITISH AND FOREIGN MARINE INSURANCE COMPANY.

ss. 382-390; 1 Parsons on Marine Insurance, ch. 2, p. 47. Moreover, ratification must be within a reasonable time. Having several years ago disclaimed all interest in the policy, the charterers now seek to adopt it, finding it to their advantage to do so. But having repudiated the contract in America they cannot ratify it in England.

[They also discussed the cases cited in the Courts below.]

Carver, K.C., in reply. The appellants elected to adopt the policy when they brought this action.

The House took time for consideration.

May 21. LORD LOREBURN L.C. My Lords, in this case the charterers of the steamship *Barnstaple*, who navigated her under a charterparty amounting to a demise of the ship, were held liable in the United States to pay damages to the owners of another ship with which the *Barnstaple* had come into collision.

The question now is whether the charterers can recover against the defendant underwriters on a policy not effected by themselves, but effected by brokers instructed by the owners, which includes risk of having to pay damages arising from collision, and contains a description of the assured wide enough to cover the plaintiffs or any others concerned in interest.

I have come to the same conclusion as did the Court of Appeal that this question must be answered in the negative.

The substantial contentions of the plaintiffs are as follows: They say that being within the description they are entitled to the benefit of the policy, because the owners were bound to insure, and so must be taken to have insured, charterers' risk by virtue of clause 22 of the charterparty. That clause provides "that the owners shall pay for the insurance on the vessel." In my opinion these words do not so bind the owners, and if an action were brought on such a clause for breach of a contract to insure it must fail. If what is suggested had been meant, nothing would have been easier than to say it.

Next, the plaintiffs urge that they are entitled to the benefit of the policy, because it must be taken to mean what it says, viz., that all "to whom the subject-matter of this policy does, may, or

shall appertain in part or in all" are insured. Now I agree that a policy may be made for the benefit of all such persons. But where it has been established that in fact the person claiming the benefit was not such a person as those who effected the policy had in contemplation Courts have disallowed his claim though he might be within the description. In the present case the plaintiffs and the owners agreed in the course of the American litigation that the former had no insurance on the *Barnstaple*, and the litigation was for a long time conducted by the plaintiffs on the footing that the owners intended to insure their own interest and no other. In reality this is the only evidence we have in regard to intention. It appears conclusive to shew that this appeal must fail.

Lord Macnaghten. My Lords, in this case an American corporation, who were the charterers of the British steamship *Barnstaple* under a time charter, claim the benefit of a policy effected by the owners in England on the hull and machinery of the vessel.

The policy was in a common form, and purported to be made on the proposal of certain insurance brokers "as well in their own names as for and in the name and names of all and every other person or persons" to whom the subject-matter of the policy did, might, or should appertain in part or in all. There was a running-down clause attached to the policy.

The *Barnstaple*, owing to the fault of the persons in charge of the navigation, who were the servants of the charterers, ran down and sank another vessel. This disaster gave rise to protracted litigation in America. The *Barnstaple* was condemned in damages, and ultimately it was decided that as between the charterers and the owners the loss must fall on the charterers.

Having discharged their liability in respect of the collision, the charterers sue the insurance company in this country. Their contention is that the charter imposed upon the owners an obligation to insure on behalf of the charterers as well as on their own behalf, or, in the alternative, that the owners were authorized to insure, and did in fact insure, on behalf of the

H. L. (E.) 1906

BOSTON FRUIT COMPANY v. BRITISH AND FOREIGN MARINE INSURANCE COMPANY.

Lord Macnaghten.

charterers, or at least in terms wide enough to cover them, and that they had duly ratified and adopted the contract.

There is not the slightest evidence of intention on the part of the owners to protect the charterers by insurance, unless such intention can be inferred from the mere fact of the existence of the policy in question taken in connection with the language of the charter.

The main part of the argument was addressed to the construction of the charter. There are only three clauses which can have any bearing upon the question. They are clause 3, clause 17, and clause 22.

Clause 3 declares that the charterers shall provide and pay for certain specified charges, "and all other charges whatsoever" except for painting and repairs to hull and machinery, and anything appertaining to keeping the ship in proper working order.

Clause 17, after declaring among other things that should the vessel be driven into port or to anchorage by stress of weather the detention or loss of time should fall on the charterers, ends with this statement: "It is understood in the event of steamer from above causes putting into any port or ports other than those to which she is bound, that the charterers are covered as to expenses as the owners are by their insurance."

Up to this point there is no reference to insurance to be found in the charter. The next and only other mention of insurance is in clause 22, in the following words: "That the owners shall pay for the insurance on the vessel."

Clause 3, if unexplained or unqualified, might possibly have given occasion for an argument to the effect that the expense of insurance was to be borne by the charterers. But clause 22 leaves no room for such a contention; and indeed, as was suggested in the course of the argument, the clause may have been inserted in order to put that matter beyond question. It will be observed that clause 22 does not indicate the amount to be insured or specify the risks to be covered. It merely says that the owners shall pay for the insurance on the vessel. It imposes no obligation on the owners which the charterers could enforce. The meaning, therefore, I think, must be simply this—

that if the owners choose to insure they must pay the premiums without recourse to the charterers. The owners are not to trouble themselves about the charterers at all. The insurance contemplated, if effected, is no concern of the charterers.

Now, if the matter rested there, it seems to me that the conclusion must be that when the owners proposed to insure, acting as they did without any communication with the charterers, the charterers cannot be regarded as persons within the contemplation of the proposal. They were not persons intended to be covered by the policy, or persons for whose benefit the insurance was proposed. They were strangers to the contract altogether.

Clause 17 is obscure. Vaughan Williams L.J. seems to think that under certain circumstances it might give the charterers the benefit of an insurance made by the owners. I cannot think that can be the meaning. I prefer the suggestion of Mr. Hamilton, that what was meant was only this: That if the charterers should desire protection against the risks contemplated, they were to look out for themselves and themselves alone, just as the owners were to do by *their* insurance on the vessel. If this be the true meaning it would strengthen the view I have already indicated, as the result of clause 22, that the insurance on the vessel was intended to be for the benefit of the insuring owners, and not in any event or under any circumstances for the benefit of the charterers.

The averments made by the charterers in the American Courts are no doubt calculated to prejudice their case here, but, considering that the insurance company was not a party to the litigation in America, I do not think that the position which the charterers took up there is of itself, and apart from other circumstances, necessarily fatal to their present contention.

I am of opinion, notwithstanding the very able argument of Mr. Carver and Mr. Llewellyn Davies, that the order appealed from is right, and that the appeal should be dismissed with costs.

Lord Robertson. My Lords, I concur.

Lord Atkinson. My Lords, I concur in the conclusion that the judgment of the Court of Appeal should be upheld and this

H. L. (E.) 1906 BOSTON FRUIT COMPANY v. BRITISH AND FOREIGN MARINE INSURANCE COMPANY. Lord Atkinson.

appeal dismissed with costs. I think that clauses 17 and 22 of the charterparty, taken singly or together, do not, on their true construction, amount to a contract between the owners and charterers that the former should insure the ship, nor do they, in my opinion, impose any duty or obligation on the owners so to do, or constitute or appoint them the agents of the charterers for that purpose.

I am further of opinion that whether the owners' agents, Messrs. Craggs & Sons, intended to insure on behalf of the appellants or not, or whether or not the brokers, Messrs. J. Holman & Sons, professed or intended to insure on the appellants' behalf and as their agents, the latter, with full knowledge of the facts, repudiated in the American proceedings the authority of the persons they now contend acted as their agents, and disclaimed the contract those alleged agents entered into.

In the record of the American proceedings a stipulation of facts agreed upon between the appellants and the owners is set forth. Paragraph 8 of this stipulation contains the following statement: "The appellants had no insurance on the said steamship."

The excuse now given for this statement is that at the time it was made the appellants were contesting their liability for the damages caused to another vessel by the negligent navigation of the *Barnstaple;* but, if their present contention be well founded, they were interested in other risks different from and in addition to the risk of having to pay damages for injury caused to other vessels by the negligent navigation of the vessel they had chartered. And the contentions that unless they were held liable in damages for this collision they had no interest in the policy of assurance, and that while that liability was undetermined this statement in paragraph 8 could not be treated as a repudiation of the authority of their agents, or a reprobation of the contract of assurance which prevents them now from approbating it, cannot, in my opinion, be sustained. At the time this stipulation of facts was agreed upon the appellants knew all the facts. They insisted, no doubt, upon a construction of the charterparty which would have protected them from liability for the damages then sued for; but the fact that the

question of construction was still sub judice, and that they did not know that their contention would fail, or that they would be held liable to pay these damages, may shew a want of appreciation of the soundness of a legal argument or the correctness of a legal opinion, but does not, in my opinion, amount to such ignorance of fact as will entitle a party to escape from the consequences of an election between two remedies made by him while that ignorance continued.

I think that the statement in this paragraph 8 must be treated as an unequivocal expression on the part of the appellants of their determination not to adopt or ratify or be bound by the contract of insurance which had been entered into, and that, though made in a suit between the appellants and a third party, it is upon the authority of *Clough* v. *London and North Western Ry. Co.* (1) binding in the present case upon those who made it.

Upon the true construction of the general clause in the policy of marine insurance so much discussed I express no opinion. Under the old authorities the governing factor in determining the person or class of persons who came within such a clause, or was or were entitled to ratify and take advantage of the contract contained in it, was apparently the intention, disclosed or undisclosed, existing in the mind of the person who effected the policy with the underwriters at the time he effected it. The underwriter, it would seem, was held to have insured those whom the person who dealt with him intended should be insured though that intention was never communicated to him. I doubt very much whether that doctrine can long survive the decision of your Lordships' House in *Keighley, Maxsted & Co.* v. *Durant* (2), or whether the rule of construction thus adopted in the case of marine policies from earlier times is not inconsistent with the root principle which lies at the foundation of all the law of contract, namely, that there must always be the consent ad idem of the two contracting minds to make a valid contract.

Having come to the conclusion I have mentioned on other points of the case, it is unnecessary for the purposes of this

(1) (1871) L. R. 7 Exch. 26, 34-6. (2) [1901] A. C. 240.

H. L. (E.) 1906 BOSTON FRUIT COMPANY v. BRITISH AND FOREIGN MARINE INSURANCE COMPANY.

appeal that I should express any opinion upon this point, and I wish to hold myself entirely free, should the necessity arise, to reconsider it upon a future occasion.

Order of the Court of Appeal affirmed and appeal dismissed with costs.

Lords' Journals, May 21, 1906.

Solicitors: *Biddle, Thorne, Welsford & Sidgwick; Waltons, Johnson, Bubb & Whatton.*

H. L. (Sc.) 1906 *May* 29.

[HOUSE OF LORDS.]

PARISH COUNCIL OF PARISH OF KILMALCOLM . . . . . } APPELLANTS;

AND

PARISH COUNCIL OF PARISH OF GLASGOW AND OTHERS . . . . . } RESPONDENTS.

Poor Law—Settlement by Residence—Maintenance without recourse to common begging or Receipt of or Application for Parochial Relief—Support by Charitable Institution—Bodily and Mental Unfitness for Self-maintenance —Poor Law (Scotland) Act, 1898 (61 & 62 *Vict. c.* 21), s. 1.

Under s. 1 of the Poor Law (Scotland) Act, 1898, which enacts that "no person shall be held to have acquired a settlement in any parish in Scotland by residence therein unless such person shall . . . . have resided for three years continuously in such parish and shall have maintained himself without having recourse to common begging . . . . and without having received or applied for parochial relief":—

Held, that a person who had for three years continuously resided in a charitable institution in the appellant parish, and during that period had not had recourse to common begging and did not apply for parochial relief, had acquired a residential settlement, and that the fact that during the whole time of her residence she suffered from mental weakness and chronic physical disease, which made her incapable of maintaining herself, did not take her out of the enactment.

Parish Council of Kirkintilloch v. *Parish Council of Eastwood*, (1902) 5 F. 274, approved.

APPEAL from a judgment of the Second Division of the Court of Session, Scotland. (1)

(1) (1904) 6 F. 457.

The question raised in the appeal was whether a pauper, Mary Gillespie, who was while in pupillarity admitted to a charitable institution known as Quarrier's Homes, situated in the appellants' parish of Kilmalcolm, Scotland, and who continued to reside in that institution for more than three years after she had reached the age of twelve years, acquired by virtue of that residence a residential settlement in the parish of Kilmalcolm under s. 1 of the Poor Law (Scotland) Act, 1898 (1), or whether she was chargeable to the respondents' parish of Houston, where she was born. The other respondents were the city parish of Glasgow, who claimed re-payment of her maintenance for a short period.

Mary Gillespie was born in the parish of Houston in February, 1881. She was the illegitimate daughter of Catherine Gillespie, who was a farm servant, who is still alive, but her parochial settlement is not known. Mary Gillespie was admitted to Quarrier's Homes, in Kilmalcolm, in October, 1887, and remained there until March, 1901, when she was removed to Quarrier's Homes, in Glasgow, and from thence to the city of Glasgow poor-house. The appellants in their statement of facts gave the following account of Quarrier's Homes:—"These orphan homes are a Glasgow institution, and were founded in Glasgow in the year 1871 by Mr. William Quarrier. The number of destitute children whose necessities had appealed to Mr. Quarrier increased to such an extent as to make it quite impossible to accommodate them in any city premises, and Mr. Quarrier purchased the farm of Nottingshill, in the parish of Kilmalcolm, in the year 1876. He

(1) Sect. 1 of the Poor Law (Scotland) Act, 1898:

"Section 76 of the principal Act (8 & 9 Vict. c. 83) is hereby repealed, and in lieu thereof it is enacted as follows:—

"From and after the commencement of this Act no person shall be held to have acquired a settlement in any parish in Scotland by residence therein unless such person shall, either before or after, or partly before and partly after the commencement of this Act, have resided for three years continuously in such parish, and shall have maintained himself without having recourse to common begging, either by himself or his family, and without having received or applied for parochial relief; and no person who shall have acquired a settlement by residence in any such parish shall be held to have retained such settlement if during any subsequent period of four years he shall not have resided in such parish continuously for at least one year and a day."

H. L. (Sc.) 1906

KILMALCOLM PARISH COUNCIL v. GLASGOW PARISH COUNCIL.

erected there his cottage homes, which now number upwards of forty, and contain about 1200 children. The children do nothing in the way of maintaining themselves in the homes. Mr. Quarrier claims that the homes are maintained by 'prayer.' The maintenance is dependent on the donations in money and kind received from day to day. These include bread, clothing, new and used, pieces of cloth, napery, books, butcher's meat, &c. The children have no uniform, so the clothing can all be utilized in dressing them. None of the persons who take charge of the various cottages have any fixed remuneration; they are all dependent on the daily donations of the public. The only qualification for admission is that the children admitted shall be in absolute destitution. All children must go to the premises in James Morrison Street, Glasgow, to be admitted, and when they leave the homes they are sent there to be discharged. The homes in the parish of Kilmalcolm are entirely for the education and training of children, and children are not kept in the homes in the appellants' parish after they are fit to do something for themselves in the way of earning a livelihood. Adults are not admitted, but occasionally when children suffer from any mental weakness or physical incapacity they are kept beyond the usual age until it is clearly seen whether they can be made fit for self-maintenance or not.

"During all the time Mary Gillespie resided in the orphan homes she was incapable of maintaining herself and was a proper object of parochial relief. Her admission was during pupillarity, and no change took place in the nature of her residence or in her condition or mode of life while in the homes. She was admitted in Glasgow, and discharged there, and during the whole period of her residence suffered from mental weakness and chronic physical disease, which made her incapable of maintaining herself. She could not at any time have led an independent life, ... but she had not begged or applied for parochial relief."

The Lord Ordinary (Lord Stormonth Darling) and the Second Division held that the pauper had acquired a settlement in Kilmalcolm in consequence of her residence for the requisite period in Quarrier's Homes.

April 2, 3. *James Avon Clyde, K.C.* (with him *Macmillan*) (of the Scottish Bar), for the appellants. This is a test case, and raised for the first time the question of the effect under the poor law statutes of residence in a charitable institution such as Quarrier's Homes.

The pauper was illegitimate and her mother a farm servant; therefore it cannot be disputed that when received into the Homes she had no settlement of her own. The case relied on by the Lord Ordinary—*Parish Council of Kirkintilloch* v. *Parish Council of Eastwood* (1), which for the first time decided that persons residing in a charitable institution in a position of sheer dependence could acquire a settlement by virtue of their residence in the institution—was wrongly decided. In any view, the institution there was designed for adults, and therefore different from that in the present case. An illegitimate child takes the settlement of its mother in the same way as a legitimate child takes its father's settlement: *Govan Combination Parish Council* v. *Greenock Parish Council.* (2) Here the pauper's settlement before she was twelve years old followed that of the mother, and, there being no change in her industrial capacity or in the nature of her residence after the age of twelve, it is impossible to differentiate between the residence before and after that age. If the mother desert her illegitimate child, the mother's settlement still remains that of the child: *Caldwell* v. *Dempster.* (3)

By the law prior to the Poor Law (Scotland) Act, 1845, persons who were poor and aged, and therefore proper objects of parochial relief, could not acquire a settlement in a parish by residence, although they might never have received relief or resorted to begging: *Runciman* v. *Heritors of Mordington.* (4) The negative words of the Acts of 1845 and 1898 shew that something more is required to establish a residential settlement than the mere living in a philanthropic institution in a state of entire dependence on charity. The judgment appealed from involves the assumption that when the pauper attained the age of twelve, she ipso facto became emancipated or forisfamiliated, and was acquiring an independent settlement. But to attain a

(1) (1902) 5 F. 274.
(2) (1905) 7 F. 884.
(3) (1883) 10 R. 1263.
(4) (1784) Mor. Dict. 10583.

H. L. (Sc.) 1906 KILMALCOLM PARISH COUNCIL v. GLASGOW PARISH COUNCIL.

settlement a person must have the intention to live in one parish rather than another: see *Adamson* v. *Barbour* (1); *Parish Council of Rutherglen* v. *Parish Council of Glasgow*. (2) A person a proper object of parochial relief cannot obtain a settlement: *Porteous* v. *Blair* (3); *Jack* v. *Thom*. (4) Here the pauper was a child requiring care and support, and she practically remained a child when she was twenty years of age. It was impossible for a person in that position to comply with the Act with regard to self-maintenance. She never could by residence acquire a settlement, for she was all along a proper object for parochial relief. Could it be said "she had for three years resided and maintained herself in the parish"? The cases of *Thomson* v. *Gibson* (5), *Hay* v. *Cumming* (6) and *Forbes* v. *Marshall* (6), and *Webster* v. *Mackenzie* (7), relied on by the respondents, do not apply: see *Parish of Falkirk* v. *Parish of Govan* (8); *Lawson* v. *Gunn* (9); and 54 Geo. 3, c. 170, s. 6. Residence in a charitable institution in England is not available for settlement in a parish. Attaining puberty does not of itself give a settlement: *Wallace* v. *Caldwell*. (10) The appellants contend that pupillarity in the case of this child never ceased.

Scott Dickson, K.C. (with him *MacRobert*) (of the Scottish Bar), for the respondents, the parish of Houston. The pauper acquired a residential settlement in the parish of Kilmalcolm under and by virtue of s. 1 of the Poor Law (Scotland) Act, 1898, and s. 76 of the Poor Law (Scotland) Act, 1845, which are identical as far as this case is concerned, except that three years is substituted for five. The words in the Act of 1845 remained unaltered for fifty years, and the Legislature in 1898 resolved to adopt words which had been legally construed. The case of *Runciman* v. *Heritors of Mordington* (11) has never been followed since 1845. With regard to the question of maintenance, it is settled in Scotland by *Thomson* v. *Gibson* (5); *Hay* v.

(1) (1853) 1 Macq. 376
(2) [1902] A. C. 360.
(3) (1856) 19 D. 181.
(4) (1860) 23 D. 173.
(5) (1851) 13 D. 683.
(6) (1851) 13 D. 1057.
(7) (1853) 15 D. 399.
(8) (1900) 2 F. 998, 1007.
(9) (1876) 4 R. 151.
(10) (1894) 22 R. 43.
(11) Mor. Dict. 10583.

Ferguson (1), and *Parish Council of Kirkintilloch* v. *Parish Council of Eastwood.* (2) That a person sui juris and mentally capable of acquiring a settlement acquires a settlement by *mere* residence in a parish, provided he neither has recourse to common begging nor has received or applied for parochial relief. In short the words "maintain himself" are to be read in connection with the words which follow: see also *Hay* v. *Cumming* (3) and *Forbes* v. *Marshall* (3); *Webster* v. *Mackenzie* (4). As to the averment that this pauper suffered from mental weakness and chronic physical disease, weakness of mind not amounting to idiocy will not prevent the acquisition of a residential settlement: *Cassels* v. *Somerville* (5); *Nixon* v. *Rowand.* (6) The appellants do not aver that the pauper was a certified lunatic, nor that, in fact, she was a lunatic or an idiot.

Further, in the case of an illegitimate child, forisfamiliation takes place in all cases at puberty, namely, in the case of a girl, at twelve years of age: *Greig* v. *Ross* (7); *Govan Combination Parish Council* v. *Greenock Parish Council.* (8)

Ure, S.-G. for Scotland (with him *Will Thomson* (of the Scottish Bar), for the respondents, the parish of Glasgow. There has been no argument that the parish of Glasgow should be liable, but there is a distinct averment on the record that the head office of Quarrier's Homes was in Glasgow, so that it has been thought proper that the parish should be represented by counsel.

James Avon Clyde, K.C., replied.

The House took time for consideration.

May 29. Lord Loreburn L.C. My Lords, I am of opinion that the order appealed from is right, and that this appeal should be dismissed. I do not propose to enter upon any discussion of the law involved in this case, because having had the advantage of considering the opinion which has been prepared by my noble and learned friend Lord Robertson, I find myself in complete agreement with it and have nothing to add to what he says.

(1) (1852) 14 D. 352.
(2) 5 F. 274.
(3) 13 D. 1057.
(4) 15 D. 399.
(5) (1885) 12 R. 1155.
(6) (1887) 15 R. 191.
(7) (1877) 4 R. 465.
(8) 7 F. 884.

H. L. (Sc.)
1906
KILMALCOLM PARISH COUNCIL v. GLASGOW PARISH COUNCIL.

LORD MACNAGHTEN. My Lords, I agree.

LORD DAVEY. The learned counsel for the appellants have failed to convince me that the judgments delivered by the learned judges of the Second Division are wrong, and I have nothing to add. All the facts and the law also seem to be dealt with by those judges in a manner which appears to me to render it unnecessary to add anything. Therefore I concur.

LORD JAMES. My Lords, this case appears to me to be governed by authority which cannot now be disputed. The pauper Mary Gillespie, an illegitimate child, was born in the parish of Houston on February 18, 1881. She was admitted to a charitable institution called Quarrier's Homes, situated in the parish of Kilmalcolm, in October, 1887, and remained there until March, 1901, when, on account of disobedience, she was removed to the city of Glasgow poor-house, and has remained there ever since. It will be seen that the pauper attained puberty in February, 1893. It is sought to render the parish of Kilmalcolm liable by virtue of the residence of the pauper at Quarrier's Homes, within the parish.

The mental condition of the pauper is thus described : it is said that during the whole period of her residence in Kilmalcolm " she suffered from mental weakness and chronic physical disease which made her incapable of maintaining herself." Now upon those facts it must be taken that the pauper did not in one sense maintain herself—that is, she did not earn any money and had, of course, no private means of her own. She also, from mental deficiency, was incapable of earning her living. But now the authorities apparently clearly decide that the non-earning of the means of support, even when coupled with incapacity through mental weakness, short of lunacy or idiotcy, does not prevent the acquiring of a residential settlement so long as the pauper does not resort to common begging and does not apply for parochial relief.

It is sufficient if the pauper is maintained by someone. So long as there is no disqualification through begging or application for parochial relief it is immaterial from whom the means of maintenance are derived.

A series of decisions, the principal of which is the *Kirkintilloch Case* (1), have so determined, and this view of the law has been acted on for many years. It seems too late to attempt to alter rules so well established.

Doubtless this view may, as mentioned by Lord Moncreiff, cast a heavy burden upon a parish in which a charitable institution is situated, but the parish may derive benefit from the existence of the institution within its boundaries; but even if this be not so, this argument of hardship cannot alter the law.

I therefore concur in the judgments of the Lord Ordinary and of the judges of the Second Division of the Court of Session, both upon the main point and on the special averments mentioned in those judgments.

Lord Robertson. My Lords, the clear argument presented by the learned counsel brought the question before us to a very narrow point. This woman resided three years continuously in the appellants' parish, and during that period had not recourse to common begging and did not receive or apply for parochial relief. Her subsistence was derived from the funds of the charitable institution in whose home she resided; but it was not argued that this circumstance of itself excluded the application of the disputed section. The question proposed by the appellants was the much narrower one, whether the fact (for this is to be assumed) that the woman suffered from "mental weakness and chronic physical disease which made her incapable of maintaining herself," takes her out of the enactment. The words in the section relied on by the appellants are "shall have maintained himself"; but the (disappointingly) limited contention is that while a person may be within the section who de facto does not (namely, through laziness) maintain himself while able to do so, another person whose failure to maintain himself is due to mental and bodily weakness is outside the provision.

Now, if the words in question had to be construed for the first time, there is, to say the least, much plausibility in the broader view, that to come within the enactment at all a person must, during the three years, have derived his maintenance from his

(1) 5 F. 274.

H. L. (Sc.) 1906

KILMALCOLM PARISH COUNCIL v. GLASGOW PARISH COUNCIL.

Lord Robertson.

own property or labour. This view goes, of course, a great deal further than the appellants do now, and would render the fact of maintenance not being found by the person himself but by others the crucial fact, while the cause of that fact, namely, bodily or mental unfitness for self-maintenance, would be irrelevant to the question.

The construction of the statute, however, which, as a matter of history, was put on this section by the very able judges who developed the law on this subject from 1845 down to 1898 was entirely different. They held that, from the point of view of the poor law, all persons fell into two categories, according as they did or did not live off, or try to live off, the public by rates or begging; and that if people did not live off, or try to live off, the public in those ways, it was immaterial whether they lived on their own resources or on the resources of their friends, or people who acted as their friends. Accordingly, if a man did not ask parochial relief or beg, it was of no consequence whether he lived on his own means or wages or on other people's; and equally little did it matter whether the charity on which he subsisted was administered to him by individuals or by organizations. Obviously this is an entirely tenable theory, although it is open to the objection that it reduces the emphatic and energetic words "support himself" to a synonym of "live," and finds the effective enactment in the qualification introduced by the word "without." But it seems to me unnecessary to be anxious over the intrinsic merits of this construction, because the Legislature adopted it in 1898. By that time repeated judicial decisions in Scotland had completely established this construction; and in that year Parliament, while (for a different purpose) repealing the section containing the words "maintain himself," re-enacted those words as part of the new formula of residential settlement. In my opinion it must be held that, in so doing, the Legislature deliberately and of choice re-enacted them in the sense which they had been authoritatively held to possess, and that they must therefore be read in that sense.

This being so, there is nothing in the present case except the comparatively easy question whether the result is affected by the fact that the pauper was disabled from maintaining herself

by bodily or mental weakness, not involving insanity. For the reason given by the Lord Ordinary, I think the averment insufficient and irrelevant. Whether the authorized construction of the words "maintain himself" will stand the strain of a condition of insanity is a question which has not arisen and does not arise to-day. It is a question generically different from that before the House.

LORD ATKINSON. My Lords, I have had the advantage of reading the judgment which has just been delivered by my noble and learned friend, and I entirely concur.

Ordered that the appeal be dismissed with costs.

Lords' Journals, May 29, 1906.

Agents for appellants: *Bramall & White, for Morton, Smart, Macdonald & Prosser, W.S., Edinburgh; and Lade & Hood, Glasgow.*

Agents for respondents, parish of Houston: *John Kennedy, W.S., for Constable & Sym, W.S., Edinburgh; and Holmes, Mactavish & Co., writers, Johnstone.*

Agents for respondents, parish of Glasgow: *Grahames, Currey & Spens, for Mackenzie, Innes & Logan, W.S., Edinburgh.*

H. L. (Sc.)
1906
June 28.

[HOUSE OF LORDS.]

INVERARITY . . . . . Appellant;

AND

COUNTY COUNCIL OF FORFARSHIRE . . Respondents.

Public Health (Scotland)—Assessment—Special Drainage District—Expenses of forming Special District—Public Health (Scotland) Act, 1897 (60 & 61 *Vict. c.* 38), *s.* 133.

By s. 133 of the Public Health (Scotland) Act, 1897: "In any burgh or where any special drainage district has been formed under this Act . . . . the expense incurred by the local authority for sewerage or drainage within the same or for the purposes thereof and the sums necessary for payment of any money borrowed therefor either before or after the passing of this Act, together with the interest thereof, shall be paid out of a special sewer assessment which the local authority shall raise and levy on and within such . . . . special district":—

Held (affirming the decision of the First Division of the Court of Session), that where a special drainage district has been formed in a county the local authority is entitled to levy an assessment within the special district to meet expenses, including legal expenses necessarily and properly incurred in connection with, but prior to, the formation of the district.

Appeal from a decision of the First Division of the Court of Session, Scotland. (1)

This action was raised by the appellant, John Duncan Inverarity, of Rosemount, parish of Montrose, Forfarshire, against the County Council of Forfarshire, the respondents, for declarator, inter alia, "That a resolution of the said county council, at their meeting held on October 5, 1901, whereby, on a recommendation submitted as from the Brechin district committee of said county council, being the local authority under the Public Health (Scotland) Act, 1897, and Acts therein incorporated, in terms of s. 133 of the said Act of 1897, they resolved to impose, and did impose, a special assessment to meet the expense of the sewerage and drainage incurred by the local authority within the special drainage district of Hillside during the year ending May 15, 1902, or for the purposes thereof on all

(1) (1904) 6 F. 553.

lands and heritages within the said special drainage district, at the rate of 7½*d.* per £ of valuation on the owners of such lands and heritages, and the like rate of 7½*d.* per £ of valuation on occupiers of such lands and heritages, was invalid, illegal, and ultra vires of the said county council, and that the respondents were not entitled to impose the said assessment, and that the appellant was not bound to pay said assessment or any part thereof." There was no conclusion for reduction of the resolution. The appellant was heritor in the Brechin district of Forfarshire, and his property lies in whole or in part in the Hillside district, which forms part of the Brechin district. The Hillside district was formed into a special drainage district by interlocutor of the sheriff pronounced in August, 1900; and it became necessary to provide for the expense of that proceeding, amounting to 190*l.* or thereby, the greater part of which consisted of legal or Court expenses. The only question was whether the assessment should be laid on the Brechin district or on the Hillside district. The appellant was liable to contribute in either case, but if the assessment was spread over the whole of the Brechin district then the assessment falling on the appellant would be considerably less than if it was confined to the narrow area of the Hillside district. To meet that expense the county council of Forfarshire, by a resolution dated October 5, 1901, imposed a special assessment. This resolution specified (1.) the object of the assessment: (2.) the time when the expense to be met by the assessment is stated to have been incurred, viz., May 15, 1901, to May 15, 1902; (3.) the area of assessment, viz., the Hillside special district; and (4.) the rate of assessment, viz. 7½*d.* per £.

Notices of this assessment were issued to the various heritors. The appellant was dissatisfied with the assessment, and he appealed under the statute (the Local Government Act, 1889) to the finance committee of the county council. The finance committee, by a deliverance dated February 22, 1902, dismissed the appeal.

The appellants in condescendence 3 averred: "The Brechin district committee in the years 1898–99, and during the year 1900 prior to September 1, incurred expenditure principally, if

H. L. (Sc.) 1906

INVERARITY v. FORFARSHIRE COUNTY COUNCIL.

not entirely, in legal expenses incurred by them in the proceedings before the sheriff-substitute and sheriff, and, inter alia, in and about their attempts to get included in the special district the lands and houses aforesaid, which were ultimately excluded from the special district. Such expenditure for the years 1898-99 and 1899-1900 was met by a rate levied on owners and occupiers in the whole of the Brechin district, and the appellant, as one of such owners and occupiers, has paid his share of such rate. It is averred that the respondents have now transferred from the general Brechin district account to the said special district account the said expenditure for the years 1898-99 and 1899-1900, amounting to the sums of 35*l.* 3*s.* 5*d.* and 155*l.* 8*s.* 6*d.*"

To this the respondents answered: "The accounts incurred by the respondents in connection with the matter during the years 1898—in which year no legal expenses were incurred—1899 and 1900 (ending Whitsunday of that year), amounted to 189*l.* 2*s.* 3*d* These expenses were charged in the first instance against the Brechin District Public Health Account, the only account against which they could at that time be charged, and the expenditure so charged was defrayed out of the share assigned by the respondents to the Brechin district of the local taxation grants, as in relief of rates. Had this expenditure remained so charged, the result in the end would have been that it would have been paid by the ratepayers throughout the whole Brechin district, including the appellant as one of such ratepayers. But by the Public Health (Scotland) Act, 1897, and more particularly by ss. 133 and 135 thereof, it is provided, as it had previously been provided by the Public Health Act of 1867, that preliminary expenses incurred in connection with the formation of a special drainage district though properly chargeable, in the first instance, against the general public health account for the whole district, become, if and when the special district comes into existence, a proper charge against the special district account, and fall to be repaid to the public health account out of the special rate leviable on the special district, the result of such repayment being, in the present case, to put the appellant, in his capacity of ratepayer in the Brechin as distinguished from the special district,

in the position of having paid no part of such expense. No additional legal expense was incurred by the district committee in respect of lands scheduled but not included in the special district as finally designated."

By condescendence 4 the appellant averred: "The resolution actually carried at the meeting of the county council was to assess owners and occupiers in the said special district at 7½*d.* to meet the expense of the sewerage and drainage incurred by the local authority within the special drainage district of Hillside during the year ending May 15, 1902, or for the purpose thereof." The appellant also averred that under colour of the said resolution the respondents were about to levy the said rate, and apply the proceeds thereof in payment not only of expenditure alleged to have been incurred in the year ending May 15, 1902, but also in payment of the expenditure incurred as after-mentioned and in previous years, and especially of the aforesaid sums of 35*l.* 3*s.* 5*d.* and 155*l.* 8*s.* 6*d.*

The respondents answered: "Admitted that the respondents intend to levy the rate so resolved on, and to apply the proceeds thereof in payment pro tanto of the whole expenses incurred in the formation of the said special district and charged against the special district account as aforesaid, as they are entitled to do in virtue of the transfer aforesaid and of the terms of the said resolution of October 5, 1901. . . . ."

The Lord Ordinary (Lord Kincairney) found that the resolution of the respondents dated October 5, 1901, was intra vires, and the First Division adhered. (1)

May 28. *Thomas Shaw, L.A.*, and *W. B. A. Cohen* (with them *John Sanderson*), for the appellant. It cannot be reasonable that a small district should be saddled with the whole of the expense of litigation as to what should be a special drainage district. Further, s. 133 of the Public Health Act of 1897 does not justify the imposition of a rate for expenses incurred prior to the formation of the special district; and in any event did not justify a rate to pay expenses incurred in litigation.

Horace Avory, K.C., and *James Adamson* (of the Scottish Bar),

(1) 6 F. 553.

H. L. (Sc.) 1906

INVERARITY v. FORFARSHIRE COUNTY COUNCIL.

for the respondents. The decision of the Court below was correct. When the special district was formed, these preliminary expenses, just as the preliminary expenses of a provisional order for certain public works, fell to be assessed upon the special district and fall to be paid out of the special rate leviable on the special district in the terms of s. 133 of the Public Health Act. The expenses were incurred in the interest of the special district.

Thomas Shaw, L.A., in reply.

The House took time for consideration.

LORD LOREBURN L.C. My Lords, in my opinion this appeal fails, because the expenses in question can fairly be described as expenses incurred for the purposes of the special drainage district. I think the true construction of s. 133 of the Public Health Act, 1897, is that the words "purposes thereof" mean purposes of the special drainage district. I have nothing further to add to the exhaustive opinions expressed by the learned judges in the Court of Session.

LORD JAMES. My Lords, the main point involved in this case is, when explained, simple and clear.

The appellant, the pursuer in the Court below, held estates in the Brechin district of the county of Forfar. The Brechin district committee of the county council determined to form a special drainage district called Hillside, which would for the purposes of drainage be carved out of the Brechin district, and such Hillside district was duly formed. Certain legal expenses were incurred incidentally to and before the formation of the Hillside district. The amount of such expenses was by a resolution dated October 5, 1901, assessed and imposed upon this district.

The main question involved in the case is whether the assessment so made ought to have fallen on the whole Brechin district or upon the Hillside district formed out of it, and the solution of such question depends upon the construction to be put upon s. 133 of the Act of 1897, and especially upon the provision that where any special drainage district has been formed the expense incurred by the local authority for sewerage or drainage within the same or for the purposes thereof, &c., shall

be paid out of a general sewer assessment to be levied within such district.

Now the Lord Ordinary found that the resolution of the respondents to impose the said assessment was intra vires, and that the Hillside district was liable to discharge the expenses in question. The learned judges of the Court of Session concur in this view, holding that the words "where any special drainage district has been formed" do not limit liability for expenses to those incurred after the formation of the district—and also that the words "or for the purposes thereof" may include legal and preliminary expenses. This reading and application of the Act seem to me to be reasonable and correct—and therefore my opinion is that the judgment should be affirmed.

There were some minor points raised in the argument in the Court below which seem also to have been correctly dealt with.

The appeal should be dismissed.

Lord Robertson. My Lords, I am entirely satisfied of the soundness of this decision. The empowering section (s. 133) in virtue of which this assessment has been made allows the county council to assess the Hillside district for certain purposes. It seems to me that the opinions of Lord McLaren and Lord Kinnear supply, in very few words, a complete answer to the only plausible argument of the appellant; and I intend to imitate their Lordships' brevity. The initial words beginning "after" are satisfied by reference to the time of making the assessment, and have no relation to the time when the expense assessed for has been incurred. The expense now in dispute is within the words; and I think it is also in accordance with the system of setting up districts that it should be borne by the new district which has by those means obtained independence.

Order appealed from affirmed and the appeal dismissed with costs.

Lords' Journals, June 28, 1906.

Agents for appellant: *A. & W. Beveridge, for St. Clair Swanson & Manson, W.S., Edinburgh.*

Agents for respondents: *Grahames, Currey & Spens, for J. & J. Galletly, S.S.C., Edinburgh.*

[PRIVY COUNCIL.]

J. C.* 1906 *Feb.* 8, 12; *March* 28.

COLONIAL SUGAR REFINING COMPANY, LIMITED . . . . . } PLAINTIFFS;

AND

IRVING . . . . . DEFENDANT.

ON APPEAL FROM THE SUPREME COURT OF QUEENSLAND.

Law of Australia—Power of the Commonwealth Parliament—Power to impose an Excise Duty to take effect from the Date of the Minister's Proposal—Commonwealth Acts, Nos. 11 *and* 14 *of* 1902—*Constitution Act* (63 & 64 *Vict.* (*Imperial*), *c.* 12), *ss.* 51, 90—*Construction.*

On July 26, 1902, Excise Tariff, 1902 (No. 11), was passed by the Commonwealth Parliament, imposing certain uniform duties of excise, including a duty on manufactured sugar, the produce of Australia, as from October 8, 1901, the day on which the Minister had moved a resolution to that effect in Committee of Ways and Means of the House of Representatives.

On October 16, 1902, the Customs Tariff, 1902 (No. 14), was passed, which imposed uniform duties of customs as from the same date.

In a suit by the appellants to recover back excise duties on manufactured sugar collected from them between October 8, 1901, and July 26, 1902, on the grounds (1.) that it was ultra vires of the Commonwealth Parliament to impose them until the actual imposition of uniform customs duties; (2.) that the duties were imposed in a manner which discriminated between States:—

Held, that Excise Tariff, 1902, was intra vires of the Commonwealth Parliament under the true construction of the material sections of the Constitution Act (63 & 64 Vict. c. 12). Neither s. 90 of that Act nor any other section expressly or impliedly prohibited the imposition of uniform excise duties previously to that of uniform customs duties. After that event the power to impose excise duties was exclusively vested in the Commonwealth, and the power of the States in that respect ceased. Under s. 51 Parliament has power, in accordance with the usual practice, to impose the duties as from the date of the resolution (s. 4 of Excise Tariff, 1902):—

Held, also, that s. 5 of Excise Tariff, 1902, which allowed an exemption in the case of goods on which customs or excise duties had been paid under State legislation before October 8, 1901, is not a discrimination

---

* *Present:* EARL OF HALSBURY, LORD MACNAGHTEN, LORD DAVEY, LORD ROBERTSON, LORD ATKINSON, and SIR ARTHUR WILSON.

between States within the meaning of s. 51 of the Constitution Act, but is applicable to all the States alike, for a purpose which was temporary and necessary.

J. C. 1906

COLONIAL SUGAR REFINING COMPANY, LIMITED v. IRVING.

APPEAL from a judgment of the Full Court (September 4, 1903) on a special case stated by consent of parties in an action by the appellants.

The appellants are manufacturers and refiners of sugar, carrying on business at Brisbane. Between October 8, 1901, and July 26, 1902, they were called upon by the respondent, the Commonwealth Collector of Customs for Queensland, to pay sums amounting to 20,100*l.*, in respect of the 3*s.* per cwt. excise duty on 6700 tons of sugar refined by them, of which 824 tons 3 cwts. had been refined before October 8, 1901, and the rest subsequently, having been at that date raw sugar or (as to 364 tons) in process of being refined. The whole of the 6700 tons was produced and manufactured in Queensland, and was on October 8, 1901, in the appellants' stores at Brisbane connected with their refinery, and no duty of customs or excise had been paid thereon, or was under the law of Queensland payable thereon before October 8, 1901, or at any subsequent time.

The appellants, disputing the liability to duty, deposited the 20,100*l.*, under the provisions of s. 154 of the Excise Act, 1901, in the hands of the defendant as Collector, and on October 25, 1902 (after the passing of the Excise Tariff, 1902, and Customs Tariff, 1902), brought an action in the Supreme Court to recover back the amount deposited with interest, contending that the Excise Tariff, 1902, was ultra vires of the Federal Parliament.

A special case was stated by consent in the action, and on September 4, 1903, the Full Court (Griffiths C.J. and Cooper and Real JJ.) determined that the appellants were not entitled to recover, and directed judgment to be entered for the respondent with costs.

Cohen, K.C., Wise (*K.C.* of the New South Wales Bar), and *Tyrrell Paine*, for the appellants, contended that the Excise Tariff Act, 1902, was ultra vires of the Commonwealth Parliament, which was not authorized by the Constitution Act (63 & 64 Vict. c. 12) to impose duties of excise until uniform duties of customs had

J. C. 1906

COLONIAL SUGAR REFINING COMPANY, LIMITED v. IRVING.

in fact been imposed, which did not happen until September 16, 1902. It was argued that before that date it was impossible for a State to know when uniform duties would be imposed, or whether the duties proposed by the motion of October 8, 1901, would be sanctioned by the Commonwealth Parliament. Until that date, therefore, a State was not relieved from the necessity of providing by its own legislation for the expenses of its Government, and was bound to do so. Under these circumstances—and see especially ss. 89 and 92 of the Act—it was not the intention of that Act that uniform excise duties should be imposed by the Commonwealth Parliament until the passing of a Customs Tariff Act. The true meaning of s. 90 is that the power to impose excise duties does not arise until the power to impose customs duties arises. In other words, when an Act is passed imposing customs duties (all of which must under the constitution be uniform), then, and not till then, the power to impose duties (whether customs or excise) is vested in the Commonwealth. The Act does not contemplate a concurrent power in the Commonwealth and in each separate State to impose any of these duties. The State power to impose them continued till September 16, 1902, consequently the Commonwealth power to impose excise duties did not arise until that date. It was thus ultra vires of the Commonwealth to impose excise duty on the appellants' store of sugar in Queensland. No State duty had been imposed on it, but in other States duty had been imposed and paid in respect of sugar imported, and it would be contrary to the intention of the Act that a further duty should be imposed by the Commonwealth. Sect. 5 of the Excise Tariff Act, exempting goods which had already paid duty to the State, further contravened the Commonwealth Act—see s. 51 (ii.) and s. 99—in that its effect was to discriminate between States or parts of States, and gave preference to one State over another State. Reference was made to *Ex parte Wallace & Co.* (1) ; *Commissioners for Income Tax* v. *Pemsel* (2) ; *Edye* v. *Robertson* (3) ; *Stevenson* v. *Reg.* (4)

(1) (1892) 13 N. S. W. L. R. 1.
(2) [1891] A. C. 531.
(3) (1884) 112 U. S. 580.
(4) (1865) 2 Wyatt, Webb & A'Beckett, Cases at Law, 143 ; and S.C., ibid. p. 176.

Sir R. Finlay, K.C., and *V. Hawkins*, for the respondent, contended that the Commonwealth Parliament had power by the Excise Tariff, 1902, to impose, and did impose, the duty in question as from October 8, 1901. That was the time when the proposal for the duty was made by the Minister in Parliament, and there was nothing in the Act to alter the practice under which the duty in question was exigible from that date. Sect. 51 of the Commonwealth Act gave the power of taxation, "but so as not to discriminate between States or parts of States." By ss. 69 and 86 the State departments of customs and excise and the collection and control of duties (State as well as Federal) became vested in the Government of the Commonwealth on its establishment. By s. 88 uniform duties of customs are to be imposed within two years, and, by s. 90, on such imposition the power of the Federal Parliament to impose both customs and excise duties is to become exclusive, and all State laws imposing such duties are to cease to have effect, and (s. 92) inter-State trade is to be absolutely free. By s. 99 the Federal Parliament cannot by any law of trade or revenue give preference to one State or part of a State over another. The duty in question was by the resolution also imposed on all sugar produced in Australia after October 8, 1901, and on sugar produced there before that date and then remaining under customs control or excise supervision or in the ownership or possession of the manufacturers or refiners, and on which no customs or excise duty had previously to that date been paid. It was uniform throughout the Commonwealth, and did not discriminate between States, or give preference to one over another. It was at once collected, and the collection was validated by Excise Tariff, 1902 : see ss. 4 and 5. Uniform customs duties were at the same time, October 8, 1901, proposed to Parliament and thereupon collected. The Customs Tariff, 1902, imposed the duties as from the said date, and validated the collection from that date.

Under these circumstances it was contended that the Excise Tariff, 1902, does not discriminate between States, and does not otherwise contravene the Commonwealth Act.

Wise, K.C., replied.

J. C.

1906

COLONIAL SUGAR REFINING COMPANY, LIMITED v. IRVING.

1906

March 28.

The judgment of their Lordships was delivered by

LORD DAVEY. This is an appeal from a judgment of the Supreme Court of Queensland, dated September 4, 1903, on a special case which was stated in an action brought by the appellants against the respondent claiming the return of certain excise duties levied between October 8, 1901, and July 26, 1902, on sugar, the property of the appellants. The appellants base their demand for return of the duties on two grounds—

(1.) That no excise duties could be lawfully imposed by the Parliament of the Commonwealth of Australia until the actual imposition of uniform customs duties by the same Parliament, which did not take place until after the passing of the Excise Tariff, by which the duties in question were made exigible.

(2.) That the duties were imposed in a manner which discriminated between States, or gave a preference to one State over another, in violation of the provisions of the Constitution.

The Commonwealth of Australia Constitution Act, 1900 (63 & 64 Vict. c. 12), came into force on January 1, 1901. The following sections of the Constitution thereby established are material for the present purpose :—

"51. The Parliament shall, subject to this Constitution, have power to make laws for the peace, order, and good government of the Commonwealth with respect to" (amongst other things)—

"(ii.) Taxation; but so as not to discriminate between States or parts of States.

"86. On the establishment of the Commonwealth, the collection and control of duties of customs and excise . . . . shall pass to the Executive Government of the Commonwealth.

"88. Uniform duties of customs shall be imposed within two years after the establishment of the Commonwealth.

"90. On the imposition of uniform duties of customs the power of the Parliament to impose duties of customs and of excise . . . . shall become exclusive, and" on the same event "all laws of the several States imposing duties of customs and excise . . . . shall cease to have effect.

"99. The Commonwealth shall not, by any law or regulation of trade, commerce, or revenue, give preference to one State or any part thereof over another State or any part thereof."

On October 8, 1901, the Minister for Trade and Customs moved a resolution in Committee of Ways and Means of the House of Representatives that duties of customs and of excise should be imposed according to a tariff which included an excise duty on manufactured sugar, the produce of Australia, of 3*s.* per cwt. On July 26, 1902, the Excise Tariff, 1902 (No. 11 of 1902), founded on the resolution of October 8, 1901, was assented to, and on September 16, 1902, the Customs Tariff, 1902 (No. 14 of 1902), was assented to. The Excise Tariff contains the following sections:—

"4. The time of the imposition of uniform duties of excise is the eighth day of October, one thousand nine hundred and one at four o'clock in the afternoon, reckoned according to the standard time in force in the State of Victoria, and this Act shall be deemed to have come into operation at that time.

"6. All duties of excise collected pursuant to any tariff or tariff alteration shall be deemed to have been lawfully imposed and collected, and no additional duty shall be payable on any goods on which duty was so collected merely by reason that the rate at which the duty was so collected is less than the rate of duty specified in this Act, and no duty shall be payable in respect of goods delivered for home consumption free of duty pursuant to any tariff or tariff alteration."

By s. 5 of the Act all goods dutiable under the schedule which were manufactured or produced in Australia before the time when such duties are deemed to have been imposed, and were at the time subject to the control of the customs or excise supervision, or in stock, and on which no duty of customs or excise had been paid before that time, are made liable to the scheduled duties.

Between October 8, 1901, and July 26, 1902, the respondent demanded from the appellants, in respect of 6700 tons of sugar produced in Queensland, sums amounting in the aggregate to 20,100*l.*, as duty imposed on manufactured sugar, in accordance with the resolution. The appellants disputed their liability and deposited the amount in accordance with statutory provisions for that purpose. It is unnecessary now to discuss whether the payment of the duty could have been enforced

J. C. 1906 COLONIAL SUGAR REFINING COMPANY, LIMITED v. IRVING.

before the passing of the Excise Tariff, 1902, and it is not now disputed that the appellants are liable for the duty if the Act imposing the duty as from October 8, 1901, was within the powers of the Parliament. It should be added that no duty has been paid or was payable on the sugar under the law of Queensland.

It is a little difficult to understand the first point taken by the appellants. The Parliament had undoubted power to impose taxation under the express words of s. 51 of the Constitution, and it is not now disputed that the Parliament could, if it thought fit, make the Act retroactive, and impose the duties from the date of the resolution. That practice is (it is believed) universally followed in the Imperial Parliament, and (their Lordships were told) is common in the Colonial Legislatures in Acts of this description, and for obvious reasons it is convenient and almost necessary. There was nothing, therefore, in either the subject-matter of the Act, or in the mode of dealing with it, which was beyond the power of the Parliament. But it is said that by s. 90 of the Constitution the Parliament was prohibited (for it must come to that) from imposing duties of excise until uniform duties of customs had been imposed. The section referred to does not contain any such prohibition. It is only enacted that on the given event the power to impose excise duties shall become exclusive. And their Lordships cannot find any implication, necessary or otherwise, of such prohibition in that section or any other part of the Constitution. There is no inconsistency in the co-existence of excise duties imposed by the Commonwealth and similar duties imposed by the States. All that can be said is, that if some of the States had imposed such duties in the interval between the resolution and the passing of the Customs Act, which must have been collected by the Commonwealth officers, it might have given rise to some complications, and occasioned some administrative difficulty. It was further argued that the continued existence of the power of the States to impose excise duties would defeat the avowed object of the Act to impose uniform excise duties throughout the Commonwealth from the date of the resolution, and the Act, therefore, to that extent failed of its purpose and attempted to

do something which it could not do. Their Lordships do not find in any of these considerations sufficient reason for holding the Act to be ultra vires so far, at any rate, as it imposed the duty in question as from the date of the resolution. And with regard to the last point they observe that on the passing of the Customs Tariff, 1902, if not earlier, the provision for uniform duties of excise became operative by s. 90 of the Constitution. It is a plausible conjecture that it was contemplated by the authors of the Constitution that the customs tariff would precede the excise tariff, but either from an oversight or for some reason which does not appear, the Parliament thought fit to pass the excise tariff first. Their Lordships cannot say that it exceeded its powers by so doing.

The second point of the appellants appears to their Lordships to be equally wanting in substance. The argument is to this effect. The effect of s. 5 of the excise tariff is to exempt from the duties thereby imposed goods on which customs or excise duties had been paid under State legislation, but inasmuch as the scale of duties differed in the several States, and in Queensland, for example, no excise duty was imposed on sugar, the exemption operated unequally on the traders and manufacturers of the several States. The grant of such an exemption was therefore said to be a discrimination between the States within the meaning of the Constitution, and it was added that whatever might be said about the excise duties, to grant an exemption for previous payment of customs duties was arbitrary and indefensible. Their Lordships cannot accede to this argument. The substance of the enactment in question is that goods which have already paid customs or excise duties shall not pay over again, and some such provision is obviously necessary in the transition from the old order to the new. The rule laid down by the Act is a general one, applicable to all the States alike, and the fact that it operates unequally in the several States arises not from anything done by the Parliament, but from the inequality of the duties imposed by the States themselves. The exemption from the new excise duties on the ground of previous payment of customs duties seems justifiable and right in establishing a system based on the absolute freedom of trade among the States,

J. C. 1906 COLONIAL SUGAR REFINING COMPANY, LIMITED v. IRVING.

and the substitution of a uniform excise for all inter-State duties on goods as well as what are strictly excise duties.

Their Lordships will therefore humbly advise His Majesty that this appeal be dismissed, and the appellants will pay the costs of it.

Solicitors for appellants: *Paines, Blyth & Huxtable.*

Solicitor for respondent: *J. H. Galbraith.*

[PRIVY COUNCIL.]

J. C.* 1906 *April* 9, 10; *May* 24.

COMMISSIONER OF PUBLIC WORKS (AND AS SUCH REPRESENTING THE COLONIAL GOVERNMENT) . . . . . } DEFENDANT.

AND

HILLS . . . . . . PLAINTIFF.

ON APPEAL FROM THE SUPREME COURT OF THF CAPE OF GOOD HOPE.

CROSS APPEALS CONSOLIDATED.

Railway Contract — Construction — Penalty for Non-completion of Line — Liquidated Damages—"Actual Cost" does not include Interest on Moneys expended.

It was provided in a railway construction contract that in the event which happened of non-completion of the line within a specified period the plaintiff contractor should forfeit to the defendant Government certain percentages which the Government retained out of moneys payable under this and two other railway contracts as a guarantee fund to answer for defective work and also certain security money lodged with its Agent-General "as and for liquidated damages sustained by the said Government for the non-completion of the said line"; and that it should be lawful for the Government to take possession of the incomplete line and pay the balance due in respect of its "actual cost":—

Held that, on its true construction, the term "actual cost" was limited to the amount of moneys expended on the work, and that interest thereon could not be added.

Held, further, that the Government was not entitled to the retention and security moneys as liquidated damages; for the total amount thereof

---

* *Present:* THE LORD CHANCELLOR, LORD DAVEY, LORD DUNEDIN, LORD ATKINSON, and SIR ARTHUR WILSON.

was indefinite, and in the case of the retention moneys depended on the progress of construction, the amount of the percentages, and the quantity of defective work. It could not, therefore, be treated as a genuine pre-estimate of loss; but the Government was entitled to obtain judgment in reconvention for such damages as it may have actually suffered through the plaintiff's breach of contract and deduct the same from the funds in question.

CROSS appeals from a decree of the Supreme Court of the Cape of Good Hope (February 29, 1904).

The questions determined arose in the circumstances detailed in the judgment of their Lordships under an agreement dated July 4, 1900, for the construction of a railway from Mossel Bay to Oudtshoorn, and were shortly—(1) upon what basis the actual construction of the railway is to be computed; (2) whether the respondent Hills is entitled to recover from the Colonial Government certain moneys deposited with and certain moneys retained by them as security for the completion of the said agreement; and (3) whether the Colonial Government is entitled to recover from Hills under the provisions of clause 16 of the said agreement the sum of 10,000*l.* by way of forfeit.

By clause 16 provision was made for the completion of the sections of the line within the periods of time therein mentioned, and the clause further provided: "If the concessionary shall not complete the sections of the line and works described in this clause within the periods aforesaid the concessionary shall forfeit to the Government the sum of 10,000*l.* (ten thousand pounds sterling) unless the delay is proved to the satisfaction of the Commissioner to have been caused by the act of God, war, insurrection, rebellion, strikes, lock-outs or combinations of workmen or other extraordinary or unforeseen circumstances beyond the control of the concessionary or from or on the part of the Railway Department."

Judgment was entered in the Supreme Court for the respondent Hills for—(1.) 73,500*l.* 12*s.* 7*d.*; (2.) the return of the 50,000*l.* lodged with the Agent-General; and (3.) the payment of the retention moneys, viz., 66,146*l.* 18*s.* 7*d.*, with interest from the date of summons.

The balance of the actual cost of construction not paid by the Government as found by the referees amounted, in fact, to

J. C. 1906 — PUBLIC WORKS COMMISSIONER v. HILLS.

78,413*l.* 15*s.*, and the amount of 73,500*l.* 12*s.* 7*d.* mentioned in the judgment was arrived at by deducting from the sum of 78,413*l.* 15*s.* the sum of 4913*l.* 2*s.* 5*d.* retention money under clause 6 of the contract, which was then added to the sum of 61,233*l.* 16*s.* 2*d.* (due to Hills in respect of the construction of the other lines, and retained under the provisions of clause 15 of the contract), so making up the sum of 66,146*l.* 18*s.* 7*d.* retention moneys ordered to be returned to the respondent Hills.

The Chief Justice, in his reasons, held that according to the true construction of the agreement the term "actual cost" was meant to include no more than payments actually made for materials used and work done by Hills, and therefore did not include interest as claimed by him; that the sum of 50,000*l.* and the retention moneys were, under the terms of the said agreement, held as security only for the completion of the line; that the Government having determined the agreement was not entitled to retain such security without proof of damage, and that there was no proof of any damage having been sustained by the Government. The Chief Justice further held, as to the sum of 10,000*l.* claimed by the Government to be forfeited under clause 16 of the said agreement, that the forfeiture was a penalty for non-completion of certain sections of the said line; that, unless damage by such non-completion was proved, the Government was not entitled to the said sum; and that, as there was no proof of any such damage, the Government was not entitled to succeed in the claim to the 10,000*l.*

Neville, K.C., and *Mackarness*, for the appellant, contended that upon the true construction of the whole agreement, and especially of clauses 7 and 17, it was clearly the intention of the parties that the "actual cost" of the construction of the line should mean the actual payments made for material used and work done by the concessionary. It was not intended to include interest on capital expended or on moneys borrowed by him for the purpose of fulfilling his contract. With regard to the security and retention moneys in issue, the Court below was wrong in holding that they were not forfeited, by reason of the Government not having been shewn to have suffered damage by the

non-completion of the line. It was contended that the clearly expressed intention of the parties was that these security and retention moneys should be retained by the Government, and the sum of 10,000*l.* under the 16th clause be forfeited to them in consequence of the breach of contract and as liquidated damages in respect thereof. That stipulation was of the essence of the contract. It was impossible to estimate the resulting loss and injury to the public interests by the failure to complete the line, and the damages were accordingly represented by an agreed sum. The Government took possession of the line under an order of the Supreme Court, made on the ground that the respondent had failed to complete the line. The respondent had suffered no damage from any act on the part of the Government. Reference was made to *Wallis* v. *Smith* (1); *Wilson* v. *Love* (2); *Law* v. *Redditch Local Board* (3); *Clydebank Engineering and Shipbuilding Co.* v. *Don José Ramos Yzquierdo y Castaneda* (4); *Peach & Co.* v. *Jewish Congregation of Johannesberg* (5); *Davey, Paxman & Co.* v. *Landslaagte Star Co.* (6)

Upjohn, K.C., C. E. Jenkins, K.C., and *Cozens-Hardy*, for the respondent Hills, contended that "actual cost" included in ordinary commercial usage interest upon the capital expended on the construction of the line. On the true construction of the agreement the 50,000*l.* and the retention moneys were held by the appellant by way of security only. The forfeiture of the 10,000*l.* was intended to be a penalty and not liquidated damages. The ordinary rules of law regarding the recovery of penalties for breaches of contract applied, and were intended to apply, to the sums in issue in this case, which were not intended as liquidated damages. Only such part of those sums could be recovered or retained as was equivalent in amount to the damages which the Government could prove that they had sustained by reason of the breaches complained of. There was neither allegation nor proof of any damage.

Neville, K.C., replied.

(1) (1882) 21 Ch. D. 243.
(2) [1896] 1 Q. B. 626.
(3) [1892] 1 Q. B. 127.
(4) [1905] A. C. 6.
(5) (1894) 1 Off. Rep. S. A. Republic, 345.
(6) (1898) 16 Cape Law Journal, p. 57.

J. C.
1906
PUBLIC WORKS COMMISSIONER v. HILLS.
1906
May 24.

The judgment of their Lordships was delivered by

LORD DUNEDIN. The present appeals arise out of three contracts which were made between the Government of the Cape of Good Hope and the Thames Ironworks and Shipbuilding Company, Limited. Arnold Frank Hills, the respondent in the principal appeal and appellant in the cross-appeal, has been assigned into the rights of the said company.

These three contracts were all made on the same day, July 4, 1900, and were subsequently confirmed by Act of Parliament of the Cape of Good Hope, where they appear as Scheds. G, H, and I of Act 19 of 1900. They had to do with the construction of three railways—viz., No. 1, Oudtshoorn-Klipplaat; No. 2, Somerset East-King William's Town; and No. 3, Mossel Bay-Oudtshoorn. The first two were contracts for the construction of the lines of the company and the handing over of them to the Government. They were constructed and handed over, and no question, in one sense, arises on them. But moneys payable under them are partly the subject of this litigation, for the following reason. In each of them there was a clause providing that 10 per cent. should be retained by the Government from the payments falling due as the lines were constructed, and each of them also contained clauses dealing with the ultimate fate of the 10 per cent. so retained. By these clauses the 10 per cent. retained from each instalment was to form a guarantee fund, which fund was to be primarily applied to making good any defects of construction, and then "the guarantee fund or the balance thereof shall be dealt with in terms of the agreement entered into for the construction of the Mossel Bay-Oudtshoorn line."

Under these clauses sums amounting in cumulo to 61,233*l.* 16*s.* 2*d.* have been retained.

The third contract, which related to the Mossel Bay line, was rather different. This line was to remain the property of the contractors, but in respect of their engaging to construct the line the Government was to pay them a subsidy at the rate of 2000*l.* per mile of completed railway, not to exceed 150,000*l.* in all. Provision was made for the payment of this subsidy as the work went on, but subject to the retention of 10 per cent. of it by the Government.

A sum of 50,000*l*. had been lodged as security by the company in the hands of the Cape Agent-General, and s. 15 of Sched. I provides that this sum and the sums retained by way of 10 per cent. of the instalments out of the payments on lines (1.) and (2.) should be handed over to the company as follows, viz., one-third when the Mossel Bay line had been completed to a certain geographical point, one-third when to a certain further point, and one-third on final completion.

Then comes s. 17, on which the controversies in these appeals directly turn. It is in the following terms:—

"17. The concessionary undertakes to push forward the construction of the line with all possible speed and to complete the same within two years of the date of the approval of this agreement by Parliament. In the event of the non-completion of the line within the time hereinbefore mentioned, unless the delay is proved to the satisfaction of the Commissioner of Public Works to have been caused by the Act of God, war, insurrection, rebellion, strikes, lock-outs, or combinations of workmen, or other extraordinary or unforeseen circumstances beyond the control of the concessionary, or from or on the part of the Railway Department, the security referred to in this agreement to wit:—

"The ten per cent. (10 %) retention money under this agreement, together with the ten per cent. retention money under the agreements for the construction of the Oudtshoorn-Klipplaat and the Somerset East-King William's Town Lines, dated July 4, 1900, and the security lodged with the Cape Agent-General shall be forfeited to the Colonial Government as and for liquidated damages sustained by the said Government for the non-completion of the said line, and thereupon the agreement between the Government and the said concessionary shall cease and determine, and it shall be lawful for the Government to enter upon and take possession of such incomplete line of railway as has been constructed by the said concessionary, and the Government shall thereafter as soon as the amount of the actual cost of such incomplete line shall have been ascertained pay to the said concessionary the amount so ascertained less such amount as shall have been paid on account of subsidy and less the amount of retention money and security hereinbefore referred to."

J. C. 1906 — PUBLIC WORKS COMMISSIONER v. HILLS.

The company failed to complete the line within the two years, or within a period to which the two years had been by mutual consent extended. They did not even advance with it so far as to be able to claim any of the partial payments under s. 15. Accordingly, on June 15, 1903, the Government applied to the Court to get a declaration of the failure of the company to complete the line, and for leave to enter upon and take possession of the line in terms of s. 17. The Court gave judgment accordingly. Against that judgment an appeal was taken, but subsequently abandoned, and the judgment now stands as final between the parties.

The company, who by this time were represented by the present respondent Hills, then brought the present action against the Government, asking for payment of the value of their line, and the handing over of the sums retained and of the sum of 50,000*l.* above mentioned, as also of the sum of 4913*l.* 2*s.* 5*d.*, being 10 per cent. of the instalments of the subsidy retained on railway No. 3. The Court gave judgment in favour of the plaintiff for a sum of 73,500*l.* 12*s.* 7*d.*, being the actual cost of the works as found by referees to whom it had remitted the question (but with no allowance for interest on capital), under deduction of the said sum of 4913*l.* 2*s.* 5*d.*, and also gave judgment for the plaintiff for the sums of 66,146*l.* 18*s.* 7*d.* (made up of the said sums of 4913*l.* 2*s.* 5*d.* and 61,233*l.* 16*s.* 2*d.*) and 50,000*l.*

The parties in the principal appeal do not raise any question as to the sum of 73,500*l.* 12*s.* 7*d.*, but in the cross-appeal the appellant Hills prays for a further addition in name of interest on capital. On this point their Lordships entirely agree with the remarks of the learned Chief Justice. To add interest would seem to them to disregard the plain meaning of the word "actual" as applied to cost. The referees have here, as practical men, found the cost of the works—in other words, they have said that so much money was expended in order to make them. To add something more in name of interest would be to add something which never could be actual cost, for it would either be a sum calculated on an assumed general rate of interest, or it would be a sum which varied according to the financial position of the

particular contractor. That "actual cost" in this contract is used in no such fanciful sense is clearly shewn by the use of the words in s. 7 of Sched. I, where provision is made for its ascertainment as regards each instalment by the certificate of an engineer.

This disposes of the cross-appeal. In the principal appeal the Government has complained of the judgment in so far as it gives the respondent Hills the sums of 66,146*l.* 18*s.* 7*d.* and 50,000*l.* and claims these in terms of s. 17 as being theirs in name of liquidated damages for non-completion of the line within the specified time.

Their Lordships have no doubt that the case of the non-completion of a railway would be a natural and proper case in which to make such a stipulation. But the question arises in each particular case whether such a stipulation has been made, and it is well settled law that the mere form of expression "penalty" or "liquidated damages" does not conclude the matter. Indeed, the form of expression here, "forfeited as and for liquidated damages," if literally taken, may be said to be self-contradictory, the word "forfeited" being peculiarly appropriate to penalty, and not to liquidated damages.

The House of Lords had occasion to review the law in the matter in the recent case of *Clydebank Engineering and Shipbuilding Co.* v. *Don José Ramos Yzquierdo y Castaneda.* (1) It is perhaps worthy of remark, in view of certain observations of the learned Chief Justice in the Court below, that that was a Scotch case, that is to say, decided according to the rules of a system of law where contract law is based directly on the civil law and where no complications in the matter of pleading had ever been introduced by the separation of common law and equity.

The general principle to be deduced from that judgment seems to be this, that the criterion of whether a sum—be it called penalty or damages—is truly liquidated damages, and as such not to be interfered with by the Court, or is truly a penalty which covers the damage if proved, but does not assess it, is to be found in whether the sum stipulated for can or can not be regarded as a "genuine pre-estimate of the creditor's

(1) [1905] A. C. 6.

J. C. 1906 PUBLIC WORKS COMMISSIONER v. HILLS.

probable or possible interest in the due performance of the principal obligation." The indicia of this question will vary according to circumstances. Enormous disparity of the sum to any conceivable loss will point one way, while the fact of the payment being in terms proportionate to the loss will point the other. But the circumstances must be taken as a whole, and must be viewed as at the time the bargain was made.

Applying this principle to the present case their Lordships are unable to come to the conclusion that the sum here can be taken as a genuine pre-estimate of loss. The determining factor is that the sum is not a definite sum, but is liable to great fluctuation in amount dependent on events not connected with the fulfilment of this contract. It is obvious that the amount of retained money under contracts 1 and 2 depended entirely on the progress of those contracts, and that, further, as those moneys are primarily liable to make good deficiencies in these contract works, the eventual sum available to be dealt with under the provisions of s. 17 of this contract could not in any way be estimated as a fixed sum.

Their Lordships therefore hold that the sums are not liquidated damages under s. 17.

So far as a claim is made under s. 16 for 10,000*l.*, there seems no ground for argument that the sum is liquidated damages, as the expression used points to forfeiture pure and simple.

Their Lordships are not, however, satisfied that the Government has been given a proper opportunity to prove such damages, not exceeding the sums in the penalties, as they can make out. In the Court below the whole contention seems to have turned upon the question of liquidated damages, yea or nay. The judgment of the learned Chief Justice which decides—as their Lordships think, rightly—that the damages are not liquidated, does not directly deal with the question of damages, unless certain remarks are held to lay down the proposition that in such a contract the Government, as a Government, could suffer no damage. Their Lordships do not take that view. That the Government had a true and valuable interest in getting a line constructed, even although when constructed it was not to be their property, seems to be sufficiently established by the fact

that they were content to pay a subsidy of 2000*l.* a mile. They have not got that line complete, but, on the contrary, have got on their hands an incompleted line, incapable of yielding profit in its present state, but for which they have been obliged to pay a considerable sum of money. It seems to their Lordships that there are obvious elements of damage in such a position, and that the Government should be given the opportunity of proving such damage and evaluating it in money.

Their Lordships will therefore humbly advise His Majesty to declare that before the plaintiff (the respondent in the principal appeal) obtains judgment for the sums of 66,146*l.* 18*s.* 7*d.* and 50,000*l.* awarded to him by the judgment of the Supreme Court dated February 29, 1904, the defendant (the principal appellant) is entitled to prove such damage as he may have actually suffered through the plaintiff's breach of contract, and to obtain judgment in reconvention for such amount to be deducted from the sums awarded to him by the judgment of the Supreme Court, and that subject to such declaration the defendant's appeal ought to be dismissed, and further that the plaintiff's cross-appeal ought to be dismissed.

The parties will pay their own costs of the appeal and cross-appeal respectively.

Solicitors for appellant: *Wilson, Bristows & Carpmael.*
Solicitors for respondent: *Cox & Lafone.*

[PRIVY COUNCIL.]

J. C.* 1906 *April* 10.

NORTON . . . . . INFORMANT;

AND

ALLAN ARTHUR TAYLOR . . . . . DEFENDANT.

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

New South Wales Act (2 *Edw.* 7, *No.* 35), *s.* 24—*Construction—Liability to Penalty.*

Under the New South Wales Act (2 Edw. 7, No. 35), s. 24, according to its true construction, a person holding a civic office is not liable to a penalty as being knowingly interested in a contract with his municipality when he has merely supplied materials to a contractor who chooses to buy them from him without any concerted arrangement that he should do so.

APPEAL by special leave from a decision of Pring J. (March 18, 1905), affirming a decision of a stipendiary magistrate (February 20, 1905) dismissing an information in which the appellant was the informant.

The information alleged that between December 6, 1904, and January 6, 1905, the respondent being "an alderman of the municipal council of the city of Sydney, and not being a shareholder nor a director in any joint stock company under the exemptions set out in the Act 2 Edw. 7, No. 35, did knowingly become interested in a certain contract with W. T. Henley & Co., Limited, for the supply of material to the said municipal council of the city of Sydney whilst he the said Allan Arthur Taylor held and occupied the position of alderman of the said municipal council contrary to the statute in such case made and provided."

The respondent pleaded not guilty, and the magistrate held that the matters proved were insufficient to support it.

By s. 24 of Act 2 Edw. 7, No. 35, it is provided: "Any person who, while holding any civic office under this Act, continues to be or becomes directly or indirectly, by means of partnership with any other person, or otherwise howsoever

* *Present:* THE LORD CHANCELLOR, LORD DAVEY, LORD DUNEDIN, LORD ATKINSON, and SIR ARTHUR WILSON.

knowingly engaged or interested in any contract, agreement, or employment with or on behalf of the council, except as a shareholder, but not being a director in any joint stock company, shall be liable to a penalty not exceeding 100*l.* nor less than 50*l.*, and shall be for three years thereafter disqualified from holding any civic office."

The magistrate signed a special case for the opinion of the Supreme Court which stated, in effect, as follows:—

In or about June, 1902, an English company, W. T. Henley & Co., Limited, being about to tender for the supply and erection of certain electric lighting plant, including cables, pipes and wooden troughs or troughing, for the municipal council of Sydney, obtained from Allan Taylor & Co. quotations for the supply to W. T. Henley & Co., Limited, by Allan Taylor & Co., who carried on business as timber merchants in Sydney, at certain prices, which are not material, of certain timber for wooden troughs or troughing, and other purposes necessary for carrying out the contract should the same be obtained. The quotations were given by one Anderson, the partner of the respondent in the said firm of Allan Taylor & Co.

The respondent was a member of the firm of Allan Taylor & Co., and was elected an alderman of the municipal council of Sydney on December 1, 1902, and was re-elected on December, 1, 1904, and continued in office during the whole of that time. On December 9, 1904, he was elected lord mayor.

On February 4, 1903, W. T. Henley & Co., Limited, tendered as above, and at a meeting of the Electric Lighting Committee of the said council held two days afterwards it was moved by the respondent, then being an alderman and a member of the said committee, and carried, that the said tender be recommended to the council for acceptance, notwithstanding the fact that there was a lower tender before the committee; and in consequence a contract was made. At various times thereafter, continuing throughout the year 1904, verbal orders for timber for the said wooden troughs or troughing were given by W. T. Henley & Co., Limited, to Allan Taylor & Co. with the knowledge of the respondent, and timber was supplied accordingly by Allan Taylor & Co. and paid for on the said quotations.

J. C. 1906 NORTON v. TAYLOR,

English Harrison, K.C., and *W. N. Raeburn*, for the appellant, contended that on these facts the respondent was knowingly interested in the contract between the municipal council and W. T. Henley & Co., Limited, within the meaning of the above s. 24, by reason of the supply by his firm, with his knowledge and consent, to W. T. Henley & Co., Limited, of timber to be used for the purposes of the said contract. The respondent was within the mischief against which the section was directed, for his duty to the council conflicted with his interest in the dealings of his firm. Reference was made to *Lefeuvre* v. *Lankester* (1); *Nutton* v. *Wilson* (2) [LORD DAVEY referred to *City of London Electric Lighting Co.* v. *London Corporation* (3)]; *Barnacle* v. *Clark* (4); *Ex parte Anderson* (5); *Ex parte Landsdown.* (6)

H. Terrell, K.C., and *C. C. Scott*, for the respondent, were not heard.

1906 *April* 10,

The judgment of their Lordships was delivered by

THE LORD CHANCELLOR. Their Lordships have come to the conclusion that this appeal cannot succeed. There are many ways in which a person holding a civic office might be brought within the Act 2 Edw. 7, No. 35, as for instance if he had a share in the original contract, or if he were employed by way of sub-contract to execute the original contract or part of it; or it might be perceived by the Court that an arrangement had been made under which he was to be the person to supply the materials for the original contract. In those cases, whether it was done directly or indirectly, he might be liable, and no device to conceal the real nature of the transaction would prevail. But their Lordships do not think that he is liable merely for supplying materials to the contractor who chooses to buy them from him without any sort of understanding or arrangement that he should do so. Courts of justice in such cases would be vigilant to observe evidence of any concert to enable a civic officer to derive benefit from a contract. But in the present case there is no proof to shew the liability of the respondent.

(1) (1854) 23 L. J. (Q.B.) 254; S. C. 3 E. & B. 530.
(2) (1889) 22 Q. B. D. 744.
(3) [1903] A. C. 434.
(4) [1900] 1 Q. B. 279.
(5) (1880) 1 N. S. W. L. R. 338.
(6) (1886) 7 N. S. W. L. R. 434.

In these circumstances their Lordships will humbly advise His Majesty to dismiss this appeal. The appellant will pay the costs of it.

J. C. 1906 NORTON v. TAYLOR.

Solicitors for appellant: *Lowless & Co.*
Solicitors for respondent: *Snow, Fox & Higginson.*

[PRIVY COUNCIL.]

VICTORIAN RAILWAY COMMISSIONERS . DEFENDANTS;

AND

BROWN . . . . . PLAINTIFF.

J. C.* 1906 *June* 20.

Ex parte VICTORIAN RAILWAY COMMISSIONERS.

ON APPEAL FROM THE HIGH COURT OF AUSTRALIA.

Practice—Special leave to Appeal from High Court of Australia.

Where petitioners for special leave have elected to appeal to the High Court of Australia, from which it is known that there is no further appeal without special leave, their Lordships will not, except in a very special case, entertain their petition.

Clergue v. *Murray*, [1903] A. C. 521 (where the same rule was laid down in reference to the Supreme Court of Canada), followed.

THIS was a petition by the above-named defendants for special leave to appeal from the order of the High Court of Australia (November 25, 1902), dismissing an appeal from the order of the Full Court of Victoria (June 28, 1905), which directed that the respondent recover from the petitioners 862*l.* 17*s.* 8*d.* as compensation under s. 93 of the Railways Act, 1890. The petition alleged that a special case was agreed upon in the respondent's action for the determination of the Supreme Court of Victoria submitting two questions which the Victorian Court answered to the effect above stated; that the High Court, in dismissing the appeal, held by a majority that the right to compensation given by s. 99 of the Public Service Act, 1883, and s. 72 of the Railways Act, 1883 (for which the said s. 93 is substituted), is of a different and

* *Present:* THE EARL OF HALSBURY, LORD DAVEY, SIR ARTHUR WILSON, and SIR ALFRED WILLS.

J. C.
1906
VICTORIAN RAILWAY COMMISSIONERS v. BROWN.
VICTORIAN RAILWAY COMMISSIONERS, *Ex parte.*

wider nature than the compensation which officers of the Civil Service were entitled to under Act No. 160; that the said judgment is final and conclusive, and decides matters of great public importance and interest affecting numerous employees of the petitioners specified in the said s. 72, and also numerous unclassified officers specified in the said s. 99, which is now s. 107 of the Public Service Act, 1890.

Sir R. Finlay, K.C., and *Rowlatt*, for the petitioners.

1906
June 20.

The judgment of their Lordships was delivered by

LORD DAVEY. Their Lordships have considered the very full statement of the grounds for this petition by Sir Robert Finlay, but they cannot see their way to advise His Majesty to grant special leave to appeal in this case.

One matter which weighs in their Lordships' minds very much is that the Victorian Railway Commissioners, who are the proposed appellants on this petition, have elected the Court to which they will appeal. They had the option, if they thought fit, of appealing direct from the Supreme Court of Victoria to His Majesty in Council; or they might elect to go to the High Court, from which it is known that there is no appeal unless special leave be given.

Now the High Court of Australia is a Court of the very highest authority, as to which Lord Macnaghten, in delivering the judgment of this Board in the case of the *Daily Telegraph Newspaper Co.* v. *McLaughlin* (1), says: "It occupies a position of great dignity and supreme authority in the Commonwealth. No appeal lies from it as of right to any tribunal in the Empire." If the parties think fit to appeal to the High Court instead of coming to this Board and the judgment appealed from is affirmed by the High Court, their Lordships will not as a rule entertain a petition for special leave to appeal. Their Lordships say "as a rule" advisedly, because it must not be understood that their Lordships disclaim their power of doing so, but a very special case must be made in order to induce them to exercise their power.

(1) [1904] A. C. 777.

The same point arose with reference to the Supreme Court of Canada in the case of *Clergue* v. *Murray*. (1) After stating the well-known principles upon which this Board has advised leave to appeal from the Supreme Court of Canada, their Lordships say this : "And in the case of the *Consumers Cordage Co.* v. *Connolly* (which was a petition for leave to appeal from a judgment of the Supreme Court of Canada heard by this Board on June 27, 1901), it was said that where a person has elected to go to the Supreme Court it is not the practice to allow him to come to this Board except in a very strong case. It is different where a man is taken before the Supreme Court, because he cannot help it. But where a man elects to go to the Supreme Court, having his choice whether he will go there or not, this Board will not give him assistance except under very special circumstances."

Exactly the same considerations apply to a petition for leave to appeal from the High Court of Australia, and their Lordships, being of opinion that the circumstances of this case are not of that special character, will therefore humbly advise His Majesty that the petition be dismissed.

Solicitors for petitioners : *Freshfields.*

(1) [1903] A. C. 521.

[HOUSE OF LORDS.]

H. L. (E.) 1906 *May* 14.

DENABY AND CADEBY MAIN COLLIERIES, LIMITED . . . . . } APPELLANTS;

AND

YORKSHIRE MINERS' ASSOCIATION AND OTHERS . . . . . } RESPONDENTS.

Employer and Workman—Inducing Workmen to Breach of Contracts with Employers—Strike—Principal and Agent—Trade Union—Authority of Branch Officials to bind Union—Ratification.

Where workmen strike in breach of their contracts those who help to maintain the strike by money and counsel are not liable to pay damages to the employers merely because losses are thereby caused to the employers.

A trade union having been sued for damages on the ground that workmen had been induced to break their contracts with their employers by officials of the union, and that the union had ratified and adopted the acts of their officials:—

Held, that the union was not liable, those who procured the strike not having been authorized by the rules or by the action of the union.

THE material facts are all stated in the judgment of Lord Loreburn L.C. The effect of the rules of the respondents' association is given in that judgment, and in that of Lord James of Hereford.

The questions left to the special jury at the trial before Lawrance J., and their answers, were as follows:—

1. Did the defendants Nolan and Humphries, or either of and which of them, unlawfully and maliciously procure the men to break their contracts of employment by going out on strike on June 29 without giving notice?—Answer, Yes. 2. If you answer the first question in the affirmative, then were Nolan and Humphries, or either and which of them, in so doing purporting to act as agents of the association and for its benefit?—Answer, Yes. 3. Did the members of the committees of the Denaby and Cadeby branches, or any of them, unlawfully and maliciously procure the men to break their contracts of employment by going out on strike on June 29 without giving notice?—Answer, Yes. 4. If you answer the third question in the affirmative,

then were the members of the committees in so doing purporting to act as agents of the association and for its benefit?—Answer, Yes. 5. Did the defendant association, by its executive council or by its officials, ratify the acts of Nolan and Humphries, or of the members of the committees, in so procuring the men to break their contracts?—Answer, Yes. 6. Did the defendant association, by its officials or by the members of the committees of Denaby and Cadeby branches, maintain or assist in maintaining the strike by unlawful means, that is to say: (*a*) By molesting or intimidating men who were working for the plaintiffs, with a view of inducing them to cease from so working?—Answer, Yes. (*b*) By inducing or attempting to induce men who were willing to enter into contracts of service with the plaintiffs or to work for them to refrain from so doing?—Answer, Yes. (*c*) By the grant of strike pay against the rules of the association?—Answer, Yes. 7. Did the defendants Wadsworth, Parrott, Frith and Hall, or any and which of them, maintain or assist in maintaining the strike by unlawful means, that is to say, by any and which of the above means?—Answer, Not personally, but as servants of the association. 8. Did the defendants, or any and which of them, conspire with each other, or with workmen in the employ of the plaintiffs, to do any and which of the matters mentioned in question 6?—Answer, Yes. 9. Did the defendants, or any and which of them, unlawfully and maliciously conspire together, and with workmen formerly in the employ of the plaintiffs, to molest and injure the plaintiffs in the carrying on of their business, and were the plaintiffs so molested and injured?—Answer, Yes.

Lawrance J. entered judgment for the appellants, the plaintiffs in the action. This decision was reversed by the Court of Appeal. Hence this appeal.

March 12, 13, 15, 16, 19, 20. *Bankes, K.C.*, and *Lush, K.C.* (*H. T. Waddy* with them), for the appellants.

Isaacs, K.C., and *Danckwerts, K.C.* (*A. Clement Edwards* with them), for the respondents, the Yorkshire Miners' Association.

L. A. Atherley-Jones, K.C., and *S. T. Evans, K.C.* (*John A. Compston* with them), for the respondents, Wadsworth and Hall.

H. L. (E.) 1906

DENABY AND CADEBY MAIN COLLIERIES, LIMITED v. YORKSHIRE MINERS' ASSOCIATION.

The arguments ranged over every point that could be raised by the ingenuity of counsel. They cited many cases, none of which were thought material by the House. All the points which go to the root of the matter are dealt with in the judgments.

Lush, K.C., in reply.

The House took time for consideration.

LORD LOREBURN L.C. My Lords, the litigation out of which this appeal arises relates to a strike at the Denaby and Cadeby Collieries, which commenced on June 29, 1902, and ended about the month of March, 1903. It will be convenient to summarize at the outset the main facts which led to this dispute.

For some years before 1902 there had been a controversy between employers and workmen at these collieries in regard to the rate of payment for removing what is called bag dirt. The controversy related to the price-list obtaining in these particular collieries, and not elsewhere, though the men had the sympathy of the defendant association and of their secretary, the late Mr. Pickard, who assisted them in negotiating for a settlement. In fact, however, no satisfactory settlement was reached.

On June 14, 1902, another dispute, not confined to these collieries, but applying to all the collieries in the defendant association, was, for the time, ended by the casting vote of Lord James of Hereford, after a meeting of the Conciliation Board. Lord James awarded, to use a phrase sufficiently accurate for the present purpose, a reduction in wages of 10 per cent. It is said that the men at the two collieries were dissatisfied with this award.

In that condition of things, when some bitterness undoubtedly existed, on Saturday, June 28, certain officials of the Denaby and Cadeby branches of the defendant association summoned a meeting of the men in both collieries for the morning of Sunday, June 29. Only 400, or fewer, out of 5000 attended the meeting. It was addressed by officials of both branches, who advocated an immediate strike. Unhappily the men followed this advice, and passed a resolution to stop the wheels. Pickets were placed, and on the night shift of that Sunday, June 29, all except four refused to work. On Tuesday, July 2, one of the four was assaulted in

a cowardly fashion, and then the other three ceased working also. Few, if any, of the others worked from June 29 until the end of the strike in the following March.

Inasmuch as the men were all working under contracts which could not be terminated except after fourteen days' notice, it is manifest that the abrupt cessation of work on June 29 involved a breach of contract and was unlawful.

This was fully recognized by the council of the defendant association, to which many of the strikers belonged. I shall discuss later on the relations between the Denaby and Cadeby branches of the association and the association at large. At present it is enough to say that the council of the association constituted its supreme governing body and controlled its funds. At this stage the council refused to maintain the strike by giving strike pay. Further, they sent representatives at once to the two collieries, who told the men they had acted illegally in breaking their contracts and must return to work, and that then they could take a ballot according to the rules of the association to decide whether they should resume the strike after working out their fourteen days of contract service. The men consented, and, but for an accident, would have resumed work.

In August, 1901, the Home Secretary had issued some new regulations in regard to timbering, which, rightly or wrongly, were by some persons supposed to be ultra vires. Those who had been employed in these two collieries before August of 1901 had signed contracts which left them free to contest the legality of these regulations because the regulations were not embodied in their contracts, and therefore had no contractual force upon them. When on July 17, 1902, the workmen offered to resume in compliance with the advice of the defendant association they were required to sign fresh contracts in accordance with the practice always observed in those collieries in regard to workmen who had been absent from their work. These fresh contracts expressly embodied the new regulations of the Home Secretary, and the men declined to sign them, a proceeding in which they were supported, not only by the officials of their branches, but also by the officials of the defendant association. Accordingly the strike continued.

H. L. (E.)
1906
DENABY AND CADEBY MAIN COLLIERIES, LIMITED v. YORKSHIRE MINERS' ASSOCIATION.
Lord Loreburn L.C.

After this incident the council of the association treated the case no longer as a case of strike, but of lock-out, and claimed that they were entitled, under the rules of the association, to grant at these two collieries strike pay. Strike pay was granted by the defendant association from August 24 (dating back to August 17), 1902, down to February, 1903, when one Howden, a member of the association, obtained an injunction against the association prohibiting any further grant of strike pay on the ground that the rules did not admit of this payment under the circumstances. That view was upheld on an appeal to this House: *Yorkshire Miners' Association* v. *Howden.* (1) As soon as the injunction was granted the men in both collieries submitted, and the strike ended in March, 1903.

After the strike ended the Denaby and Cadeby Main Collieries, Limited, brought this action. Though there were many defendants, the chief purpose was to fix the defendant association, who alone were in the position to pay damages, with a liability for the loss that had been incurred by the plaintiffs. For the present, therefore, I will deal with the case only so far as it relates to the defendant association.

The pleadings are of great length, and state the contentions in various forms; but after the evidence had been given counsel for the plaintiffs asked the learned judge to leave nine questions to the jury. Counsel for the defendants, claiming that there was no evidence to go to the jury, refused either to suggest questions for themselves or to take responsibility for those suggested on behalf of the plaintiffs. The learned judge accordingly left to the jury all the nine questions as they stood. The jury answered all of them in favour of the plaintiffs, and they embody the ultimate form in which the case against the defendant association was shaped.

Taken from this source, the first head of claim by the plaintiffs may be stated as follows:—The defendants Nolan and Humphreys unlawfully and maliciously procured the men to break their contracts of employment by going out on strike on June 29 without giving notice. In so doing Nolan and Humphreys purported to act as agents of the defendant

(1) [1905] A. C. 256.

association and for its benefit. The members of the committees of the Denaby and Cadeby branches of the defendant association also unlawfully and maliciously procured the men to break their contracts of employment by going out on strike on June 29 without giving notice. They also, in so doing, purported to act as agents of the association and for its benefit. And the defendant association, by its executive council or by its officials, ratified these acts of Nolan and Humphreys or of the members of the committees. In short, the plaintiffs say that the defendant association by its agents instigated the commencement of the strike and ratified the acts of its agents in procuring the breach of contract. This head covers questions 1 to 5 inclusive.

Now it is quite clear that the central council did not know the strike had begun till Monday, June 30. When they learned of it they at once declared that it was illegal. If we yielded to the suggestion that the strike of June 29 must, nevertheless, from its very suddenness, have been engineered by the central council behind the scenes we should be acting on pure imagination. Nor can I see any evidence that the persons who procured the men to break their contract purported to act as agents of the defendant association, or that the latter at any time ratified that proceeding. All the proof is that the breach of contract was from beginning to end disapproved at headquarters.

Another view, however, was presented in regard to this first period. Mr. Bankes contended that Nolan and Humphreys, delegates of the two branches, and the committees of the two branches, had, as the jury found, in fact procured the strike on June 29 in breach of contract, and that the defendant association was, under its constitution and rules, liable as principals for this wrongful conduct of their agents, apart from any ratification. It is necessary to ascertain the relations of the association with its branches and their respective officials in order to decide this point of agency.

In substance the position is as follows:—The defendant association comprises about 150 branches, extending, we were told, over Yorkshire and the Midlands. The Denaby branch and the Cadeby branch consist of men working at each of these two adjoining collieries, both belonging to the same owners, and

H. L. (E.) 1906

DENABY AND CADEBY MAIN COLLIERIES, LIMITED v. YORKSHIRE MINERS' ASSOCIATION.

Lord Loreburn L.C.

I suppose, roughly speaking, that each branch of the association consists of men working in the same colliery or under the same employers. Certainly in the present case it is so.

Every member of the association contributes according to a fixed scale to its funds. These funds are collected by the branch, and after defraying its local expenses the balance is handed over to the association to be applied in paying the general expenses, the benefits, such for example as funeral allowances, and also, in case of need, in maintaining a strike. There are branch officials elected by members of the branch, and central officials of the association elected by the branches.

The supreme government of the association is vested in the council (central council, I will call it), which consists of officials, the president, two secretaries, the treasurer, and also of delegates, one from each branch, each with a voting power proportioned to the number of members in the branch. It is unnecessary to mention the central executive committee, which only acts on emergencies in the interval between council meetings, and has no authority in regard to strikes.

Besides these central bodies each branch has a committee of its own, consisting of persons elected by members of the branches. Careful provisions are to be found in the rules dealing with the rights and duties of the association and the branches respectively in case of strikes and lock-outs, and for a very obvious reason. Strikes or lock-outs may be, and generally are, local in their character, and arise out of disputes relating to the local conditions of service. If one branch were able without control to call out its members on strike in consequence of a local dispute and to claim the financial support of the entire association as a matter of right, then the caprice or folly or selfishness of a few men might dissipate the common funds of all. Hence the necessity for strict rules.

No branch is allowed to strike unless two-thirds of its members, voting by ballot, so determine, nor unless three-fourths of the members composing the branch record their votes. And even if that majority is procured the members of the branch are entitled to strike pay only "if the employers refuse to remedy their grievances and after all proper and peaceful means have

been tried to effect a settlement by deputations from members with the advice and assistance of the council and such member or members be permitted to cease work by the sanction of the association in accordance with the rules." (1) Another rule authorizes a registered vote to be taken throughout the entire association whenever any number of branches numbering one-fourth of the council demand such vote on (among other things) "the adoption or prolongation of a strike." (2)

The net result of these provisions is that all strikes of a branch are prohibited unless the prescribed majority of branch members is obtained; that no strike pay is to be granted except the strike be sanctioned by the central council after peaceful efforts have been exhausted, but that a plebiscite of the entire association may adopt a strike after it has commenced.

On the other hand, if any branch is locked out in consequence of any action lawfully taken by the association to remedy grievances the men are entitled to maintenance equal to strike pay.

Can it be said in the face of these rules that the association is liable in damages for the action of delegates or of branch officials or committees in procuring a strike (whether accompanied or not by breach of contract) without a ballot, without the sanction of the council, and without a registered vote of the entire association? In my opinion the association is not so liable.

The delegates are agents of the branches to represent them in the council. When acting in the council they are agents of the entire association to do the business of the council. They are not agents of the association to represent it or act for it in their localities, either as to strikes or other matters.

Branch officials and committees are elected by members of the branch, who are engaged in a common service under one particular employer. If they quarrel with the employers about the conditions of their service they have a right to strike. The association does not confer that right, which is derived from the general law, but it restricts the right by rules requiring a prescribed majority as the indispensable preliminary. I do not see

(1) Rule 72. (2) Rule 12.

H. L. (E.) 1906

DENABY AND CADEBY MAIN COLLIERIES, LIMITED v. YORKSHIRE MINERS' ASSOCIATION.

Lord Loreburn L.C.

how either the officials or committees thereby become agents of the association to procure a strike even if it were lawful and regular, still less to procure it contrary to the rules and contrary to the law in breach of existing contracts.

It is true that on certain conditions the association is bound to furnish strike pay. Will that circumstance create the agency for which Mr. Bankes contends? I will suppose that the employers also are members of an association of coalowners, as we were told they are, and that the coalowners' association bind themselves to support each other with money in the event of any one member locking out his workmen after certain conditions had been observed. If such member locked out his men without giving the notice prescribed by contract it would seem very strange to suppose the other members were liable to damages for an act over which they had no control and which was contrary to the conditions. Yet the cases are precisely the same.

In my opinion the first head of claim entirely fails.

The second head of claim advanced by the plaintiffs is to be found in questions 6, 7 and 8, and relates, not to the initiation of the strike, but to its maintenance by the defendant association after it had been commenced.

It amounts to this, that after the strike had commenced the defendant association, by its officials or by the members of the committees of the Denaby and Cadeby branches, assisted and maintained the strike by means of intimidation in order to prevent the men who were still working from continuing to work, by inducing others not to enter the plaintiffs' service and by granting strike pay against rules of the association. It also charged, as appears by question 8, against all the defendants that they conspired with the other defendants or with the plaintiffs' workmen to do all these things. This latter point really adds nothing to the charge, and in no case could any judgment be entered in respect of the 8th question, because the answer leaves it quite open which of the many defendants were guilty and of which, among the several accusations made against them, any of the defendants were guilty.

I find no evidence in support of any material part of this

charge against the defendant association. That also was the view of the majority of the Court of Appeal (Mathew and Cozens-Hardy L.JJ.), though the Master of the Rolls dissented.

As to the charge that the central council granted strike pay against the rules of the association, that is certainly true, and the fact was finally established in *Howden's Case*, decided by your Lordships in 1905. The association was restrained at the instance of one of its members from applying its funds for strike pay upon the ground that such payment was not authorized by the rules. I fail to see how the fact that the rules were contravened can confer upon the plaintiffs any ground of action which otherwise they would not have possessed. The wrong committed by the central council of the association was against its own members in dissipating their funds, not against the employers, who had no interest in the funds. Had the rules permitted it the grant of strike pay would have given the plaintiffs no cause of action. It seems a novel argument that they should acquire a right of action from the fact that the money so paid was derived by breach of trust from the funds of the association whom they sue. It is an attempt by persons who are no parties to the trust to sue for breach of it those who are parties.

The third and last head of claim was formulated in the 9th question put to the jury, which runs as follows:—"Did the defendants, or any and which of them, unlawfully and maliciously conspire together, and with workmen formerly in the employ of the plaintiffs, to molest and injure the plaintiffs, and were the plaintiffs so molested and injured?" To this question the answer of the jury was "Yes." Here, again, no judgment could be entered against any defendant upon this answer, for the simple reason that the jury have not informed us which of the defendants took part in the conspiracy. In the view, however, that I take this circumstance will not affect the result. The question itself relates entirely to an alleged conspiracy after the commencement of the strike to which workmen formerly in the employment of the plaintiffs were parties.

No unlawful methods were used by the defendant association or sanctioned by it. And if we were to hold that those who maintained the strike by helping with money the men on strike

H. L. (E.) 1906

DENABY AND CADEBY MAIN COLLIERIES, LIMITED v. YORKSHIRE MINERS' ASSOCIATION.

Lord Loreburn L.C.

and their families are liable in damages merely because it caused loss to the employers, we should in effect be saying that every strike is an actionable wrong.

Accordingly I am of opinion that no case has been established against the defendant association.

In regard to the other defendants, Nolan and Humphreys suffered judgment to go by default, and are not before your Lordships' House. The remaining defendants and the representatives of those who are deceased have hardly been the subject of attack in this House, and no separate argument directed against one or more of them apart from the defendant association has been advanced. It is sufficient to say that their case stands upon substantially the same footing as the defendant association, and that in regard to them also I think the judgment of the Court of Appeal ought to stand.

LORD MACNAGHTEN. My Lords, I have had the advantage of reading in print the judgment which has just been delivered, and I entirely agree with it. I do not think I could usefully add anything to what the Lord Chancellor has said.

LORD DAVEY. (1) My Lords, the Yorkshire Miners' Association is a trade union registered under the Trade Union Acts, 1871—6. It consists of 150 branches, including the Denaby Main branch and the Cadeby Main branch, and has about 63,000 members. The association is governed by rules which provide for the appointment of a president, general and financial secretaries, a treasurer, and a general council consisting of the above officers of the association and elected delegates from each of the branches, with an executive committee with limited powers to act in urgent cases. The branches also have their own chairman, secretary, treasurer, and committee. The object of the action out of which this appeal has arisen is to make the general funds of the association liable for the damage sustained by the appellants, the owners of the Denaby Main and Cadeby Main

(1) This opinion of Lord Davey's was, owing to an accident, not delivered in the House, and is therefore not binding as an authority. It is printed here for its intrinsic value.

Collieries, through a strike of the men employed at those collieries which lasted upwards of six months. The association, representing all its members, says that its funds can only be made liable for the consequences of acts done by its duly appointed officers or its executive council acting within the powers entrusted to them respectively by the rules or by some agent employed by them for an authorized purpose and acting in the course of his employment.

The learned counsel for the appellants, in their very able arguments, endeavoured to shew that the officers of the branches were officers of the association, and acted as such in initiating and conducting the strike in question. A careful examination of the rules with the assistance of counsel on both sides has satisfied me that this contention cannot be maintained, and that the branch officers were not agents of the association in any sense relevant to the present discussion, or empowered to commit or bind the members of other branches by their action. The branch officers were bound to conform to the rules and to any minutes of the general council, but subject to such restrictions as might thereby be imposed on them they had the entire control and management of the business of their branches. In particular I am of opinion that every branch had an independent right to determine for itself whether it would strike or not without the intervention of the general council. But no member could receive strike pay from the general fund unless the strike receive the sanction of the association. In rule 12 provision is made in a certain event for a general vote being taken on the "adoption or prolongation" of a strike. Assuming that rule to apply to local strikes, which is not clear, the only effect of the council withholding its "adoption" or "sanction" (whichever word is used) seems to be that strike pay will not be allowed.

The first five questions answered by the jury relate to the period from June 29 to July 17, 1902. All the learned judges in the Court of Appeal were agreed that there was no evidence fit to be laid before the jury to support these findings, and I agree. Indeed, in my opinion, it would not be too much to say that the evidence given proved exactly the reverse of these findings. The arguments in support of the

H. L. (E.) 1906

DENABY AND CADEBY MAIN COLLIERIES, LIMITED v. YORKSHIRE MINERS' ASSOCIATION.

Lord Davey.

findings were, first, that the officers of the branches were for this purpose, and acted in the initiation of the strike as, the agents of the association, upon which I have already made my comment; and, secondly, a suspicion suggested by counsel (for it was nothing more), unsupported by any evidence fit for consideration by the jury, that the "bag dirt" dispute was not the real cause on which the men determined to strike on June 29. That dispute, it was said, was a mere pretext to cover their dissatisfaction with the recent award of the umpire of the Conciliation Board directing a reduction of 10 per cent. on the standard wages throughout the district, and the strike was in fact a general strike organized by the general council. The history of the strike is made clear on the documentary and oral evidence. The bag dirt question had been a long-standing grievance at the Denaby Colliery, and on Saturday, June 28, stoppages of a considerable amount were made from the wages of the miners in connection with it, and (as they thought) unjustly. This event excited some irritation, and on the following day, Sunday, June 29, the local leaders, in what counsel aptly described as a fit of temper, held a meeting and unadvisedly passed a resolution to stop work at the Denaby Colliery, without communicating with the officers of the association at Barnsley, and without either taking a ballot or giving notices to determine their contract with the colliery owners. The miners at Cadeby, in sympathy with their comrades at Denaby, passed a similar resolution. The strike commenced on the same evening, and information was given to Mr. Pickard, the general secretary of the association, on the following day. The resolution thereupon passed by the executive committee of the association on June 30 was unexceptionable in its terms, and in accordance therewith Mr. Cowey, the president, sent a telegram to the branch secretaries that the men must resume work at once, as they were out contrary to the rules and resolutions of the association. At a meeting of the general council held on July 19 Mr. Wadsworth, the vice-president, and Mr. Walsh, another member of the council, were directed to attend a meeting on the following day and tell the men that they must resume work, and then take a ballot of Denaby and Cadeby Main Collieries the first day they work as to whether

or not they would give in their notices to terminate their contract of service to get their grievances settled, and Mr. Pickard was directed to communicate with Mr. Chambers with a view to the men resuming work.

Walsh and Wadsworth attended a meeting at Denaby on July 15, and both made speeches. They told the men they were outside the rules of the association, and advised them to humble themselves and resume work and hold a ballot, and a resolution to that effect was passed unanimously. These speeches were copiously commented on during the hearing of this appeal, and I have since had the opportunity of reading and carefully examining them. The speakers both expressed strong sympathy with the efforts of the men to get their grievances redressed, and their regret (which they said was shared by the council) that the council could not help them while they remained outside the rules. They spoke severely, and in terms which were neither complimentary nor polite, of Mr. Chambers's unwillingness (as they considered) to meet the men fairly with a view to a settlement of what they considered their grievances of long standing. A passage in Walsh's speech referring to the "rats" at Denaby is open to some criticism. But, looking at the object and general tenor of the speaker's remarks, I do not think that the speech can fairly or reasonably be interpreted as an incitement to the men to commit acts of violence, intimidation, or other illegal character in connection with the strike.

This ends the first chapter of the story. It is apparent from the documentary evidence (including the notes of the speeches made by them) that the local leaders acted on their own impulse, and did not purport to act on behalf of the association or for the benefit of the association. In fact the bag dirt dispute seems to have applied only to the Denaby Colliery, and I have not found any evidence which contradicts or qualifies the prima facie inference to be drawn from the documents. I have some difficulty in understanding what is meant by ratifying an act done by persons not purporting to act on behalf of another or for his benefit. But it is really not necessary to discuss this, because both the officials and the general council of the association repudiated the action of the local branches as soon as they heard

H. L. (E.) 1906

DENABY AND CADEBY MAIN COLLIERIES, LIMITED v. YORKSHIRE MINERS' ASSOCIATION.

Lord Davey.

of it, as being outside the rules. I am, therefore, of opinion that there is no evidence to sustain the first five findings of the jury.

When the men went to resume work on the night of July 16 or morning of July 17 they found that they would not be permitted to do so unless they "signed on" afresh, or, in other words, entered into new contracts of service. The evidence is not very clear; but it seems that the contract books which they were required to sign incorporated some timbering rules which had been made and promulgated in August, 1901, and were not therefore in the contract books which they had previously signed, although Mr. Chambers was probably right in saying that they did in fact form part of the contract under which the men were working at the time when they ceased work. Anyhow the men were suspicious and averse to signing anything which seemed to them a new form of contract, and Mr. Pickard supported them by his advice, though the reasons for such advice can unfortunately only be matter for conjecture. The men, therefore, did not resume work in the pits.

My Lords, the appellants were perfectly within their right in electing to treat the absence of the men from work since June 29 as a rescission of their contracts and requiring them to enter into new contracts of service before resuming work. But they cannot have it both ways. If these men were no longer in the employment of the colliery owners the original vice which infected the initiation of the strike on June 29 was purged, and the men were no longer in the position of "playing" (to use their own expression) in breach of their contracts, but were henceforth men who declined to enter into contracts of service with the colliery owners on the conditions offered them, which they had a perfect right to do. Then came the important question of strike pay. Mr. Pickard appears to have thought that the situation resembled a lock-out by the colliery owners, and strike pay could properly be paid in accordance with the rules. And on July 24 a resolution was passed at a special council meeting that strike pay be paid from the first day when the men presented themselves for work, and Mr. Chambers would not allow them to resume work unless they signed a new contract. Strike pay was accordingly paid out of the funds of the association until

February, 1902, when it was stopped by injunction in Howden's action, and the strike collapsed.

My Lords, it has been held in this House, affirming the decision in the Courts below, that the payment of strike pay to the Denaby and Cadeby strikers was unauthorized by the rules of the association, and therefore illegal: *Yorkshire Miners' Association* v. *Howden*. (1) There is no evidence impugning the good faith, both of Mr. Pickard and the council, but they made a grievous mistake. The payment was ultra vires as regards not only the council, but also as regards the association itself. In other words, it was not the act of the association, and was incapable of ratification by the members of the association. And I have some difficulty in seeing under these circumstances how the unauthorized employment of the association's money by its trustees can prejudice or create any liability against the association.

The general council made two further attempts to arrange an interview with the colliery manager with a view to the settlement of the strike, but without result. There is no record or evidence of any further intervention of the general council or executive committee, or any of the officers of the association, until November 17, when by a resolution of the executive committee Messrs. Parrott and Walsh were commissioned to attend a meeting on the 24th. Parrott was what was called the "agent" of the association, the duties of his office being defined by rule 16. He was also a member of the Conciliation Board of the employers' and workmen's representatives. The meeting which he attended was occasioned by the appellants having caused some of the men on strike who occupied cottages to be served with ejectment notices. Mr. Parrott made a speech, the general tone and effect of which appears to me to be unexceptionable. It was, in fact, in favour of ending the strike. But in the course of it he used the epithet "devilish." He said that to turn people out of their houses and let them remain empty was a most devilish thing in his opinion. He explained in his evidence that he was thinking of the women and children and the approaching winter. But even so the epithet was exaggerated and ill-advised. It is possible,

(1) [1905] A. C. 256.

H. L. (E.) 1906

DENABY AND CADEBY MAIN COLLIERIES, LIMITED v. YORKSHIRE MINERS' ASSOCIATION.

Lord Davey.

however, to make too much of it, and I am not disposed to regard an isolated expression like this as either evidence of a malicious intention or desire to spite the appellants or an incitement to violence or illegal action. As a matter of fact, although ejectment orders were obtained, they do not appear to have been proceeded with, and there is no evidence of any harm having been done by Parrott's speech. The resolution passed was in favour of taking steps to end the strike by negotiation as urged by Parrott.

My Lords, I am of opinion that the sixth, seventh, eighth, and ninth findings of the jury also cannot be maintained. In my opinion there is no evidence that the association by its officials took part in or was privy to either molestation or intimidation, and I have already expressed my opinion that the association was not responsible for the acts of the branch officials. I do not think that inducing or attempting to induce men not to work for a particular employer, or a combination for that purpose, is a cause of action, if it be done in furtherance of what the parties in good faith believe to be their trade interests, though it may injure the employer in his business: *The Mogul Steamship Company's Case* (1) and *Allen* v. *Flood.* (2) If this were not so, I do not very well see how any general strike could ever be maintained. On the other hand, if the combination be actuated by a malicious intention to spite and injure another without just cause it would be actionable: *Quinn* v. *Leathem.* (3) I have examined this evidence with the assistance of the able arguments addressed to your Lordships, and I do not find any evidence of any such unlawful and malicious conspiracy in the present case. If, as all the learned judges in the Court of Appeal agreed, the branch officials were not acting as agents for the association in the initiation or conduct of the strike, the only facts which can be relied on as evidence against the association are the grant of strike pay and the speeches made by Walsh and Parrott. And I am of opinion that those facts are an insufficient foundation for the verdict of the jury against the association in this action.

In my opinion the appeal fails, and should be dismissed with costs.

(1) [1892] A. C. 25. (2) [1898] A. C. 1.
(3) [1901] A. C. 495.

LORD JAMES OF HEREFORD. My Lords, the facts controlling the case have already been so fully stated to your Lordships that I shall not refer to them beyond the extent necessary for explaining the judgment I have arrived at.

The action was brought to recover damages from the defendants, an association registered under the Trade Union Act of 1871, and from certain individuals the trustees and other officers of the said union.

Substantially the cause of action (as alleged in the pleadings) was that the several defendants had wrongfully employed the funds of the defendant association in wrongfully and maliciously procuring and inducing workmen employed or formerly employed by the plaintiffs to break their contracts with the plaintiffs and not to enter into contracts with them, and unlawfully to remain in possession of the plaintiffs' houses, and for wrongfully and maliciously aiding and carrying on by unlawful means a strike of the plaintiffs' workmen. A claim was also made to recover damages on account of a conspiracy to effect the same unlawful acts.

The case as presented by counsel at the Bar on behalf of the plaintiffs sought to establish the liability of the defendants on various grounds. It was argued: (1.) That the defendant association—the central body—by themselves or their agents molested the plaintiffs in carrying on their business. (2.) If this was not established, then in the alternative that the defendant association ratified the acts of the branches of the association. (3.) That the defendant association, by themselves or their agents, supported and maintained the plaintiffs' workmen in carrying out certain illegal acts. (4.) That the individual defendants were personally liable in respect of the above alleged causes of action.

The solution of the questions raised by these propositions depends upon the construction to be put upon the constitution of the defendant trades union under its rules, and also upon the result of certain facts given in evidence. This union is registered under the Acts of 1871 and 1876. Certain rules declare and provide the objects, government, and constitution of the union when registered under the Act of 1871.

H. L. (E.) 1906

DENABY AND CADEBY MAIN COLLIERIES, LIMITED v. YORKSHIRE MINERS' ASSOCIATION.

Lord James.

The union had, at the time of the committal of the alleged cause of action, upwards of 60,000 members. The central governing body had its headquarters at Barnsley, consisting of a council and an executive council, with certain paid officials. There were some 150 branches, of which those of Denaby and Cadeby were important and numerous in membership. The government and business of the union and of its branches are controlled by a body of rules, of which the principal and most material may be summarized as follows:—4. The supreme government of the union is vested in a council consisting of certain named officers. 5. The council to meet once in every six weeks. Rules 28 and 29 create an executive committee of not less than thirteen members elected by the branches of the union. The duty of this committee is to deal with all matters of emergency arising between the meetings of the council, but the committee has no power to decide upon questions relating to strikes or lock-outs.

Rules 31 to 47 deal with the constitution and management of the branches. Rule 37 is as follows:—"All local branches shall be conducted by a committee of not less than five or more than nine financial members, president, secretary and treasurer included, whose duty shall be to attend all meetings whether regular or special and shall at all times transact the business of the branch as directed by the rules and minutes of the general council."

By rules 38, 39, 40 and 41 the mode of electing the branch committees and the method of dealing with the business of the branches are dealt with. Rule 46 deals with the manner in which the financial business of the branches shall be carried on. Rule 64 provides for the strike pay to members permitted to cease work by the sanction of the union in accordance with the rules, and by rule 72 no branch is allowed to strike or leave off work with the view of causing the works to stand, unless sanctioned by two-thirds of the members composing the branch when such strike shall be determined by registered ballot.

The effect of these rules seems to be very concisely and correctly stated by Cozens-Hardy L.J., and I adopt the following portion of his judgment: "Now under these circumstances

it is clear that it is competent to the union to order or adopt a strike. Such action would ordinarily be taken only when the interests of the members as a whole are considered to be affected. But it is quite clear that it is contemplated that a branch as distinct from the union may strike. In that case great care is taken that the branch members shall have no claim for strike pay out of the union funds unless certain forms are complied with and the sanction of the council obtained. A local strike will naturally be engineered by the local branch officials, but in my opinion the branch officials are not agents of the union with authority to bind the union by their acts in a local strike. Such agency must be founded on something outside the rules, and its existence must be proved by those who rely upon it." Accepting this view, it becomes necessary to consider the facts proved outside the rules in order to determine whether the liability of the defendants is established by such facts and occurrences apart from the effect of these rules.

It seems that in the spring of 1902 the local workmen in the Denaby and Cadeby Collieries were in a state of discontent in consequence of the employers' attitude in relation to what was called the bag dirt question. On Sunday, June 29, 1902, a meeting of the operatives at the two collieries was summoned, and was attended by some 300 or 400 miners. The following resolution was passed by them: "That this meeting is of opinion that the time has now arrived when some steps should be taken in reference to the reduction of men's wages for bag dirt and fines for different things at Denaby and Cadeby Collieries, and that having tried to come to some amicable understanding and failed, the only thing that is left for us to do is to stop the wheels in both collieries."

The grievance as stated in this resolution appears to have been of a local character, but it was urged in argument on behalf of the plaintiffs that this resolution did not correctly set out the cause for the intended stoppage of the wheels, and that the real cause was the hostility entertained by the men throughout a large district towards the action of the Conciliation Board, which had lately by the casting vote of the chairman directed a reduction of the workmen's wages by 10 per cent. throughout

H. L. (E.) 1906

DENABY AND CADEBY MAIN COLLIERIES, LIMITED v. YORKSHIRE MINERS' ASSOCIATION.

Lord James.

the whole of the federated districts. But in my view this allegation was not supported by evidence. It is true that the decision to reduce the wages had lately been arrived at, and that in some twenty other collieries about this time strikes took place, but causes for these strikes were shewn to exist and to be unconnected with the decision of the Conciliation Board. It must, therefore, be taken that the resolution correctly stated the grievance complained of, and that grievance was of a local and not of a general character.

The resolution thus passed was promptly acted on. According to the evidence of the manager of the collieries the first shift after the meeting was at 10 o'clock the same night. But the men at the two collieries did not go to work, and, having given no notices of discontinuance, they broke their contracts, committing an unlawful act, and the strike commenced. So far the decision to commit the unlawful act of breaking the contracts made by the individual workmen was the act of the two branches, and not of the central body. The latter, however, were promptly informed of the step that had been taken, and promptly dealt with it. On the next day, June 30, the executive committee met at Barnsley, Mr. Carey, the president, presiding, and passed the following resolution:—"That Mr. Carey be instructed to wire the secretary of Denaby and Cadeby main branches, stating that in the opinion of this executive they ought to have a meeting and agree to resume work at once, as they are out contrary to the rules and regulations of the association." This resolution was confirmed at the council meeting of July 14, when it was arranged that certain members of the central body should proceed to the collieries and tell the men that they must resume work, and then take a ballot the first day they worked as to whether they would send in their notices to terminate their contract of service.

The representatives of the central body attended at the collieries in pursuance of the resolution, and in consequence of the advice given the workmen at the collieries resolved to resume work, but were met by a demand to sign a new contract of service. This contract contained a new term recognizing the validity of some rules recently made by the Home Office, and

thereupon the men refused to sign it. The employers declined to allow the men to return without a fresh contract, and so the collieries continued idle for many months.

At this time Mr. Pickard, the president of the association, and other members of the council, appear to have been advised that the men had not broken their contracts, and that therefore the masters, by refusing to allow them to continue their work under the original contracts, had locked them out. Apparently this view, however incorrect, was acted on, and on July 24 a resolution was passed granting strike pay from the day when the men offered to resume work, and were refused unless they signed a new contract.

It should be noted that before any strike pay was voted the unlawfulness of the acts of the men had been clearly established. They had absented themselves from their work for a fortnight, whilst it was proved that an absence of some two or three days was regarded as establishing a discontinuance of service. "The strike" had thus commenced, but this word is of an artificial character, and does not represent any legal definition or description. The legal effect of what had occurred was that the men had wrongfully left their employment without giving the necessary fourteen days' notice; that therefore the contract between them and their employers was broken, and that the latter had the right to treat, and did treat, the different contracts of service as at an end. They also required, as I have said, that if the men sought to return to their work they must do so under fresh contracts of service, which, however, the men refused to recognize, and thus the non-employment and the idleness of the mine continued until January, 1903.

Now, in respect of the period from June 29 to July 15, the members of the Court of Appeal were unanimous in holding that no liability attached to the trade union central body, and in such view I concur. I do so because I think that there is nothing to be found in the rules that makes the officers of the branches the agents of the central body, and also because I can find no evidence from which it can be shewn that authority was given to the branches to act between those dates as such agents.

But the determination of the case is not yet arrived at. It

H. L. (E.) 1906

DENABY AND CADEBY MAIN COLLIERIES, LIMITED v. YORKSHIRE MINERS' ASSOCIATION.

Lord James.

was further contended on the part of the plaintiffs that the acts of the defendants' union in granting strike pay and some individual acts established liability on account of what was termed maintaining the strike existing at the Denaby and Cadeby Collieries. Importance must be attached to this argument in consequence of the judgment given by the learned Master of the Rolls upon the point thus raised. In relation to it consideration should be given to the term "maintaining the strike." If one assists in procuring the commission of an unlawful act, doubtless liability follows, and so if the defendants had done anything, by assistance or otherwise, to induce the branch workmen to break their contracts the union would have been liable. But no such inducing to break a contract was proved. When the assistance was given, that is, when strike pay was voted, the unlawful acts had been committed, all the contracts of employment were terminated, and employers and employed were in respect of contracts entirely unconnected. So that the effect of the grant of strike pay was not to cause or induce the commission of an unlawful act, but to place the workmen in the position of being able to maintain themselves without entering into a new contract of labour with the plaintiffs or with anyone else. This is no more than the subscribing to a strike fund. Within the last few years we have had instances of the public contributing largely towards the maintenance of men who had ceased to work under conditions which constituted what is called a strike. Were these subscribers liable to an action? It surely must be admitted that they were not, even if the workmen had broken their contracts.

Some other grounds of liability were alleged, but may be briefly dealt with. It was urged that the money of the union was unlawfully expended when applied to the strike pay granted. That may be so as between the members of the union and those who made the grant, so that an injunction could be obtained to restrain such payments. But this faulty application does not confer any cause of action upon the plaintiffs, who have no interest in the money misapplied. If the subscribing to a so-called strike fund is legal, the source from which the money subscribed is derived, however tainted, cannot create illegality.

I concur also in the judgments given in the Court of Appeal that no acts of molestation were brought home to the union, and also that there was no legal ratification of the acts of the branch officials by the central body.

In relation to the liability of Parrott, Wadsworth, and Hall, I think it follows that of the union. Those men were not guilty of independent tortious acts. Nolan and Humphreys did not appear, and must be held to be liable, but probably that liability is of no importance to the plaintiffs.

For these reasons I think that the judgments of the majority of the Court of Appeal must be affirmed.

Lord Robertson. My Lords, I agree that this appeal should be dismissed, and I shall add a few words only on that part of the case on which the Court of Appeal was not unanimous.

From the first part of the case, however, I carry forward this, which is my ground of judgment upon it, that the branch officials were not, as such, officers or agents of the respondent association; and this must be steadily kept in view on the question of maintenance, and indeed directly affects it. We start, then, with this, that the respondents were not responsible for the original breach of contract, or for those who caused it; and in fact, although on a somewhat narrow ground, they disapproved of what was done on June 29.

Now I do not profess to decide, and have no occasion to decide, more in favour of the respondents than that on the specific questions to which the findings of the jury on maintenance relate the appellants have not established liability. Those findings are in answer to the 6th question, and are lettered *a*, *b*, and *c*; and I shall consider *c* first, as it charges the only act which the association is said to have done directly by itself, viz., the grant of strike pay. Now this grant was never made except to men whose contracts were at an end; and the payment was therefore not to induce men to break contracts, but to induce them not to enter into new contracts. So far there is no illegality. Nor do I see how the fact that the payment of this strike pay was held to be a violation of the internal constitution

H. L. (E.) 1906

DENABY AND CADEBY MAIN COLLIERIES, LIMITED v. YORKSHIRE MINERS' ASSOCIATION.

Lord Robertson.

of the association turns it into an invasion of any right of third parties like the appellants.

The answer to the charge lettered *b* (inducing or attempting to induce men who were willing to enter into contracts of service with the appellants, or to work for them, to refrain from so doing) is that it is not a legal wrong.

The question lettered *a* charges the respondents with molesting or intimidating men who were working for the appellants with a view of inducing them to cease from so working. The theory upon which this charge is made can only be that by giving financial support to the strike the respondents made themselves liable for all that was done during the strike by the officers of the branches. I am unable to adopt that view, and I do not find any other valid ground for attaching such liability.

The 9th query raises substantially the same questions under the form of conspiracy, for the media concludendi are in substance the same.

The answers to the 7th and 8th queries are hopelessly ineffective, for the reason given by my noble and learned friend the Lord Chancellor.

LORD ATKINSON. My Lords, I concur in the views that have been expressed by my noble and learned friends who have preceded me, and, as both the law and the facts have been so fully dealt with by them, I do not think it necessary to go over again the ground which has been traversed. I may, however, say shortly that I beg to adopt, if I may, the judgment delivered by Cozens-Hardy L.J. in the Court of Appeal. I concur in the conclusion at which that learned judge arrived and in the reasoning by which he arrived at it.

Order of the Court of Appeal affirmed, and appeal dismissed with costs.

Lords' Journals, May 14, 1906.

Solicitors: *Johnson, Weatherall & Sturt, for Broomhead, Wightman & Moore, Sheffield; Corbin, Greener & Cook, for Raley & Sons, Barnsley.*

[HOUSE OF LORDS.]

JOHNSON (PAUPER) . . . . . APPELLANT;

AND

MARSHALL, SONS & CO., LIMITED . . . RESPONDENTS.

H. L. (E.) 1906 *May* 17.

Master and Servant—Employer and Workman—Accident—Compensation—"Serious and wilful Misconduct"—Workmen's Compensation Act, 1897.

A workman was found fatally injured in a lift on his employers' premises without a load. Upon the lift was a notice that no one was allowed to use it except in charge of a load. There was no evidence as to the circumstances under which the workman entered the lift. In an application for compensation by the widow:—

Held, that the burden of proving that the workman was guilty of "serious and wilful misconduct" within the meaning of the Workmen's Compensation Act lay upon the employers; that there was no evidence of serious and wilful misconduct within the meaning of the Act; and that the applicant was entitled to compensation.

The meaning of "serious and wilful misconduct" discussed.

THE appellant's husband, a workman in the employ of the respondents, was found fatally injured in a lift on the respondents' premises without a load. Upon the lift there was a notice, "No one allowed to use this hoist except in charge of a load." The appellant having applied for compensation under the Workmen's Compensation Act, evidence was given that the men often used the lift when not in charge of a load, without the knowledge or leave of their employers. The learned county court judge found that the respondents were not liable for compensation, holding that the injury to the deceased was attributable to his "serious and wilful misconduct," and that "serious" meant serious to the applicant, or to the respondents, or to others. The Court of Appeal (Collins M.R. and Cozens-Hardy L.J., Mathew L.J. being of opinion that judgment ought to be entered for the appellant) reversed this decision, and remitted the arbitration to the county court judge for re-hearing. Hence this appeal.

May 1. *W. H. Owen* and *E. H. Chapman*, for the appellant. The appellant is entitled to judgment for compensation, there being no evidence of "serious and wilful misconduct." Those words mean that there must be more than misconduct, and much

H. L. (E.) 1906 JOHNSON v. MARSHALL, SONS & CO., LIMITED.

more than negligence or carelessness. The meaning of wilful misconduct in a case of common law liability was elucidated by Brett L.J. in *Lewis* v. *Great Western Ry. Co.* (1) It must exceed negligence of every kind; it must involve full knowledge—in that case that the goods would be endangered or damaged by the act done; it implies both intention and persistence in wrong. Mere disobedience is not enough: *Whitehead* v. *Reader* (2), per Romer L.J., where the injured man had been forbidden to touch the machinery. Even negligence and disregard of warning combined have been held not to constitute "serious and wilful misconduct": see per Rigby L.J. in *Rees* v. *Powell Duffryn Steam Coal Co.* (3); *John* v. *Albion Coal Co.* (4) It cannot be serious misconduct to do a thing which is ordinarily safe. There was no more danger in an unloaded lift than in a loaded one. The case is far removed, for example, from the bringing of a naked light into a mine or the removal of props from a roof. Secondly, the misconduct must be shewn to have given rise to the injury: *Dublin, Wicklow and Wexford Ry. Co.* v. *Slattery* (5), per Lord Penzance. There was here no such connection between the thing done and the accident. No danger could have been anticipated from this disobedience to orders. Thirdly, there must be "affirmative proof," not surmise or inference of negligence or breach of duty: per Erle C.J., *Cotton* v. *Wood* (6); *Wakelin* v. *London and South Western Ry. Co.* (7), per Lord Watson. There must be not only some evidence, but reasonable evidence. Here there was no evidence at all how the accident happened or how the man came into the lift, and no evidence that the employers were not aware that the lift was used by workmen without loads.

C. A. Russell, K.C., and *T. Hollis Walker*, for the respondents. There was clear evidence of wilful misconduct. There was a peremptory order of general application and disobedience. It was, however, not necessary to prove in the Court of Appeal that there was such misconduct. All that had to be proved was

(1) (1877) 3 Q. B. D. 195, 210.
(2) [1901] 2 K. B. 48.
(3) (1900) 64 J. P. 164.
(4) (1901) 18 Times L. R. 27.
(5) (1878) 3 App. Cas. 1155, 1173.
(6) (1860) 8 C. B. (N.S.) 568, 571.
(7) (1886) 12 App. Cas. 41, 48.

that there was such evidence as the arbitrator might not unreasonably act upon; and he has found as a fact that there was serious and wilful misconduct within the meaning of the Act. But the appellant is not entitled to be here at all. The respondents were and are willing to accept a new trial. The appellant asked for judgment or a new trial, and, having been successful in obtaining one of the alternative forms of relief for which she asked, she cannot get the other.

Owen, in reply. The appeal is from the refusal to give judgment, and is perfectly in order.

The House took time for consideration.

May 17. LORD LOREBURN L.C. My Lords, I agree with the Court of Appeal that the result of the hearing in the county court was unsatisfactory. Mathew L.J. went further, and held that judgment ought to be entered for the appellant. That is also my own opinion.

The facts, so far as they are material, have not been disputed. A workman was found fatally injured in a lift on the respondents' (his employers') premises without a load, and no one was allowed to use the lift unless he was in charge of a load. That is all we know. It was an accident, and the widow, now appellant, must have compensation under the Act of 1897, unless the employers can prove that the injury was "attributable to the serious and wilful misconduct" of the workman. That the burden of proving this was on the employers is beyond question.

We are not dealing with negligence, but with something far beyond it, and we are applying a remedial statute. I can perceive no evidence of serious and wilful misconduct.

No doubt it was misconduct to enter the lift when not in charge of a load, for that was a disobedience of orders lawfully given. It was "wilful" in the sense that the man presumably entered of his own accord, but the word "wilful," I think, imports that the misconduct was deliberate, not merely a thoughtless act on the spur of the moment. Further, the Act says it must be "serious," meaning not that the actual consequences were

H. L. (E.) 1906

JOHNSON v. MARSHALL, SONS & CO., LIMITED.

Lord Loreburn L.C.

serious, but that the misconduct itself was so. If a servant was found once using the front door instead of the back door contrary to orders it would be misconduct, no doubt. Could anyone say it was serious misconduct? So here the lift was intended for use by workmen in charge of a load, forbidden to workmen not in charge of a load. The offence was not that the man used it, but that he used it without a load. I cannot agree that a lift is an appliance so dangerous that the use of it, when believed to be in proper condition and intended for use, does in itself amount to serious misconduct. Certainly it is for the arbitrator under the Act to decide questions of fact; but when there is no evidence it is for the Court to interpose.

Accordingly I am of opinion that an order should be made declaring the appellant entitled to compensation, and directing the county court judge to assess the amount.

LORD JAMES OF HEREFORD. My Lords, in order to determine this case it is necessary to bear in mind the scope and object of the Workmen's Compensation Act. The main object was to entitle a workman who sustained injury whilst engaged in certain employments to recover compensation from the employer, although he (the employer) was guilty of no default. The intention was to make "the business" bear the burthen of the accidents that arose in course of the employment, and relief from this liability is not found even if the injured workman be guilty of negligence. The doctrine of contributory negligence was superseded by the Act. But it was thought that if no check was placed on the workmen they might recklessly induce accidents of a serious character affecting many lives and much property, and so the Act of 1897 contains the provision that if the workman be guilty of "serious and wilful misconduct" he will be disentitled from recovering compensation.

Now it is impossible to give any general definition of the words "serious and wilful misconduct"; application of them must be made to each case as it arises. But the use of the word "serious" shews that misconduct alone will not suffice to deprive the workman of compensation. The class of misconduct that would do so might well be represented by such instances as

if a workman, whilst working in a mine on certain seams of coal, struck a match and lit his pipe, or if he walked into a gunpowder factory with nailed boots, refusing to use the list slippers provided for him. Of course, these are but instances illustrating conditions of absolute disregard of the lives and safety of many.

But, on the other hand, misconduct may well exist that is not "serious" in its nature, and therefore does not destroy the right to compensation. The circumstances of the case before your Lordships may be dealt with by way of illustration. A lift is provided in a factory; the object of the employer is that it shall be used by men when in charge of loads, and notices forbidding other use are placed in the factory. I will assume that, without the fact being brought to the knowledge of the employer or his representatives, the workmen generally, and the deceased man on the occasion in question, used this lift although they were not in charge of any loads, but from the nature of things no danger could be anticipated from the use of the lift. It was intended to be used by men ascending and descending. If there was a load in the lift the danger of its use could not be diminished—possibly it might be increased. No result producing injury to anyone could be anticipated by the use of the lift by the individual workman.

The misconduct, therefore, is reduced to the bare breach of a rule, from which breach no injuries, actionable or otherwise, could reasonably be anticipated. Does this amount to serious misconduct? In my opinion it does not. I think there is a test that may fairly be applied. Supposing the employer, on learning that a workman had travelled in the lift without a load, had dismissed him without notice, and that in consequence an action had been brought by the workman. The question whether the misconduct was sufficient to justify the dismissal without the notice contracted for would be for the jury to determine. I feel sure that most juries would certainly hold that no ground for dismissal had been shewn. Yet I think that the words of the statute, "serious misconduct," represent a higher standard of misconduct than that which would justify immediate dismissal.

I think it is worthy of observation that although it ought,

H. L. (E.) 1906

JOHNSON v. MARSHALL, SONS & CO., LIMITED.

Lord James.

under the circumstances that occurred at the hearing before the county court judge, to be assumed that there was no acquiescence for the user by the employer, yet the fact that the deceased man and other workmen openly used the lift—for they could not do so secretly—shews that they at least did not think that their conduct would be regarded as liable to much penalty.

I would also add that serious misconduct cannot be construed by the consequences of any act. A man may be told not to walk on the grass. He does so, slips up and breaks his leg. The consequences are serious, but the misconduct is not so.

If the case were sent down for a further hearing the only material fact which could be added to those already proved would be that the employer had no notice of the user of the lift. In giving this judgment I have assumed that such was the case. I therefore think that all the facts are sufficiently before your Lordships to enable you to form a final judgment in the case, and mine is that the plaintiff is entitled to recover.

LORD ROBERTSON. My Lords, the question whether two adjectives and a substantive involving censure are appropriately applied to a particular act clearly ascertained would be one which might well cause difference of opinion. I own that I take a somewhat stricter view than appears to prevail in the House to-day, and think that a breach of a regulation committed intentionally and of choice, the regulation directly relating to personal safety, might well come within the language, even although the thing done did not involve anything morally censurable. But the question, being one of conduct, is one of circumstances; and I justify my acquiescence in this reversal on the ground that I am not confident that we really know how or why this man came to enter the lift.

LORD ATKINSON. My Lords, I concur, though not without some doubt, in the opinion that, while there was evidence before the county court judge upon which he might legitimately have found that the deceased man had been guilty of wilful misconduct on the occasion of the happening of the accident which caused his death, yet that this evidence did not amount to proof

that his misconduct, though "wilful," was in addition "serious" within the meaning of the 1st section of the Workmen's Compensation Act.

In none of the authorities to which we have been referred has it been attempted to define "serious misconduct." It is scarcely susceptible of precise definition. What amounts to serious misconduct in any given case is a question of fact to be determined by the judge of first instance on the facts of that case, and the function of the Court of Appeal and of your Lordships' House is confined to deciding the question of law whether there was any evidence to sustain this finding.

In the present case the misconduct of the deceased consisted wholly and entirely in his having deliberately and in disregard of the express prohibition in writing of his employers, of which he must be taken to have been aware, used for his own purposes as a passenger lift a certain hoist erected by his employers in their factory, and designed and intended by them to be used only for the carriage of goods, the workmen in the factory being forbidden to use it except when bringing up or down the loads of goods of which they were in charge.

It was proved in evidence that the men frequently disregarded the notice and used the lift as a passenger lift; but it was found as a fact by the judge that this illegitimate user was unknown to the defendants. No evidence whatever was given to shew that there was any difficulty in using the lift, or that the deceased was unacquainted with the proper method of managing and controlling it, or that any accident had ever resulted from the use of it authorized or unauthorized. There was no person in exclusive charge of the lift, and it appeared to have been managed and controlled on each occasion of its use by the man or men who required to use it. Under these circumstances one must, I think, come to the conclusion on the evidence that there was no reason to apprehend any immediate or proximate danger in the unauthorized use of the lift, or that the deceased knew or believed that there was any risk, or, if risk at all, any but a very remote risk of injury or accident to himself, to his fellow-workmen, or to the machine itself.

The necessity which undoubtedly exists for the strict observance

H. L. (E.) 1906 JOHNSON v. MARSHALL, SONS & CO., LIMITED. Lord Atkinson.

of rules and regulations amongst the hands engaged in factories and other establishments where machinery is used, and the grave dangers which might result if a general laxness of discipline were permitted to prevail, tend to render important, breaches of rules adopted for the conduct of business, which in other places and under other circumstances might fairly be regarded as trivial; and it is the consideration of this secondary effect of the disobedience of orders or of violation of rules which causes me to entertain great doubt as to the correctness of the conclusion to which I have come.

I do not find, however, that much reliance was placed upon these considerations in the authorities to which we have been referred. The danger that, if men engaged in mines or factories are permitted without risk of loss to transgress in small things, they may be tempted to transgress in great things was not insisted upon; and, indeed, if by reason of this secondary effect of the violation of rules unimportant in themselves the wilful misconduct of a workman was always to be regarded as serious, the word "serious" might be treated as surplusage, and the position of the workman could be rendered worse than it was before the Act was passed.

In *Rumboll* v. *Nunnery Colliery Co., Ld.* (1), *Reeks* v. *Kynoch* (2), *Smith* v. *South Normanton Colliery Co.* (3), the Court of Appeal apparently considered that it was not every violation by a workman of a rule, general or special, framed for the regulation of the industry in which he was engaged, or every deviation from, or disobedience of the directions or orders of a manager or superior, however wilful, which could be regarded as necessarily amounting to serious misconduct.

Indeed, if the word "*serious*" used in this connection is to have any force or weight at all given to it, it must, I think, be held to mean at least that where the risk of loss or injury resulting to any person or thing from the doing of any particular act is very remote, or where that loss or injury, even if probable, would be trivial in its nature and character, the doing of that act, however wilful, would not amount to "serious

(1) (1899) 80 L. T. 42. (2) [1901] 18 Times L. R. 34.
(3) [1903] 1 K. B. 204.

misconduct" within the meaning of this statute, unless indeed the indirect influence of the act done on the discipline of the factory is to make every transgression serious.

In *Rumboll* v. *Nunnery Colliery Co.* (1) the rule deliberately violated by the men, which they had, shortly before the happening of the accident, been by the deputy-manager directed to carry out in a particular way—namely, the rule requiring that the roof of the mine should be adequately propped—was one of those rules the neglect of which amounted to an offence against the Coal Mines Regulation Act of 1887, subjecting the offender at the least to a penalty up to 2*l.*, to be recovered summarily.

The breach of the rule was deliberate. There was no question about that. The danger arising from the neglect of it was grave, immediate, and well recognized, and its violation, therefore, less excusable than was the disregard, in this case, of the requirements of the notice. Yet A. L. Smith L.J., in giving judgment, said that he could not regard the violation of these general rules, though thus punishable and necessary to be observed for the safety of the works, as amounting in itself, as a matter of law, to wilful and serious misconduct within the Workmen's Compensation Act.

In the present case there was no evidence that the danger of loss or injury resulting to anyone from the use of the lift was immediate or probable. Nor was any evidence given by the respondents on many points on which one would suppose it might have been given, such as the nature of the mechanism of this lift, the mode in which it was worked, regulated, and controlled—whether there were any means of communication between the interior of the lift and the upper floor, so that the person actually using the lift might be able to give some warning to those on the upper floor, and so prevent any attempt by the use of the lever on the upper floor to cause the lift to ascend or descend.

For all that appears, it may well be that this unfortunate accident was caused by the lift being, by the use of this lever on the top floor, suddenly made to ascend just as the deceased had brought it to a standstill, and was in the very act of getting out

(1) 80 L. T. 42.

H. L. (E.) 1906 JOHNSON v. MARSHALL, SONS & CO., LIMITED. Lord Atkinson.

of it; and, speaking for myself, I may say that, had it been proved that such means of communication as I have suggested existed, that these means of communication were availed of by those legitimately using the lift, that the deceased had refrained from giving any warning, and that the accident had occurred in the way suggested owing to the absence of that warning, I should have held that there was abundant evidence of wilful and serious misconduct on the part of the deceased.

The respondents, however, preferred to stand upon the letter of this notice, and to rely exclusively on the infraction of their rule. They have not, therefore, in my opinion given any evidence to sustain the onus of proof thrown upon them by the statute, and I accordingly think the appeal should be allowed.

Order of the Court of Appeal and award of the county court judge discharged; in lieu of the said award an award to be made in favour of the appellant for the amount of compensation agreed upon between the parties, namely, 242l. 16s.: the respondents to pay to the appellant her costs in the Courts below and in this House; the last-mentioned costs to be taxed in the manner usual when the appellant sues in forma pauperis: cause remitted to the county court.

Solicitors: *C. J. Smith & Hudson, for Payne & Payne, Kingston-upon-Hull; Richard F. & C. L. Smith, for Bescoby & Williamson, Retford, Notts.*

[HOUSE OF LORDS.]

BADISCHE ANILIN UND SODA FABRIK . APPELLANTS; H. L. (E.) 1906

AND

HICKSON . . . . . RESPONDENT. *June* 19.

Letters Patent—Construction—Infringement—"Exercise and Vend"—Sale in England—Delivery Abroad.

Where a contract is made in the United Kingdom to sell patented goods which are abroad, and is completed by appropriation or delivery abroad, the vendor does not use, exercise or vend the invention in the United Kingdom within the meaning of the patent.

Decision of the Court of Appeal, [1905] 2 Ch. 495, affirmed.

THE question in this appeal arose upon the facts stated in the judgment of Lord Loreburn L.C. Buckley J., following *Saccharin Corporation* v. *Reitmeyer & Co.* (1), held that there was no infringement of the patent, and this decision was affirmed by the Court of Appeal (Vaughan Williams, Stirling, and Cozens-Hardy L.JJ.).

May 8, 10. *Cripps, K.C.*, and *J. C. Graham* (*Colefax* with them), for the appellants. The dye-stuffs having been appropriated to the purchaser, the property passed to him and the contract to sell was completed. True it is that the goods when appropriated were situate abroad, but that is immaterial when (as in the present case) the contract to sell is made within the United Kingdom. By the consent of seller and buyer in England the goods were appropriated, and the property therefore passed in England: Sale of Goods Act, 1893, s. 18, r. 5, sub-r. 1. If this be not so, the words of the patent are idle; the patentee does not "have and enjoy the whole profit and advantage accruing by reason of the invention." This is upon the assumption that there was appropriation. But in fact there was no need for appropriation; the sale was of specific goods, and the property passed without need of appropriation or delivery—passed, that is, in England, where the seller and

(1) [1900] 2 Ch. 659.

H. L. (E.) 1906

BADISCHE ANILIN UND SODA FABRIK v. HICKSON.

buyer both were at the making of the contract. The point was left open in *Badische Anilin und Soda Fabrik* v. *Basle Chemical Works*. (1) There the sale and everything took place abroad; here everything (except what was immaterial) took place in England. *Saccharin Corporation* v. *Reitmeyer & Co.* (2) is inconsistent with that case, and not binding. The object of the sale was to bring the goods to England and to deprive the patentee of the protection of the patent.

A. J. Walter, for the respondent. To make a "vending of the said invention" within the meaning of the patent the thing patented must be within the United Kingdom. The patent does not apply to goods which are abroad. Unless both the contract of sale and the delivery are within the United Kingdom there is no infringement of the patent. The knowledge of the respondent that the dyes were to be used in England is immaterial.

Cripps, K.C., in reply.

The House took time for consideration.

June 19. LORD LOREBURN L.C. My Lords, I agree with the Court of Appeal that the judgment of Buckley J. ought to be affirmed.

This is an action for infringement of a patent relating to certain dye-stuffs. The facts are not in dispute. Defendant entered into a contract with another person in England to sell him a quantity of the patented article, delivery to be made at Basle, in Switzerland. Defendant then procured the goods, had them forwarded to Basle, where they were at his disposal, and transferred them by order to his agents in Basle to await his purchaser's disposal. After that his purchaser, having assented to this appropriation, was alone interested in these goods, and, we were told and I assume, sent them to England to be used in manufacture.

On these facts Mr. Cripps says that the defendant infringed the plaintiffs' patent. He points to the terms of the patent, which grants to the patentees the sole right to "make, use, exercise

(1) [1898] A. C. 200, 207. (2) [1900] 2 Ch. 659.

and vend the said invention" within the United Kingdom, and commands all others that they shall not "either directly or indirectly make use of or put in practice the said invention or any part of the same nor in any wise imitate the same."

As I understood him, Mr. Cripps argued that the defendant had "vended" these goods in England within the terms of the patent. He admitted that merely to make a contract of sale would not be "vending" or, to use a word in sense equivalent and in use more familiar, selling. But he maintained that if the contract to sell was made in England, and, in pursuance of it, goods were, by the consent of buyer and seller, appropriated to meet the contract, then the transaction became a sale completed in England, and that it did not signify whether the goods were at the time of such appropriation in England or abroad.

I cannot accept that view. A contract to sell unascertained goods is not a complete sale, but a promise to sell. There must be added to it some act which completes the sale, such as delivery or the appropriation of specific goods to the contract by the assent, express or implied, of both buyer and seller. Such appropriation will convert the executory agreement into a complete sale.

What actually happens need not involve any change either in the condition of the goods or in their location. They were the property of the seller before the appropriation; they become the property of the buyer as soon as they are appropriated; and that is all. But if the goods are abroad when the property so passes, it seems to me you cannot say that the sale wholly took place in England.

In my opinion, if you must decide in what country an appropriation of goods by consent takes place, it takes place not where the consent is given, but where the goods are at the time situate.

This is sufficient in my view to dispose of the grounds put forward by the appellants, but I desire to add that I entirely agree with the opinions expressed by my noble and learned friend Lord Davey, which I have had an opportunity of seeing in print. It is unnecessary for me to repeat them.

H. L. (E.) 1906

BADISCHE ANILIN UND SODA FABRIK v. HICKSON.

LORD DAVEY. My Lords, the sole question in this case is whether a sale by a person in this country to a purchaser, also resident here, of an article made abroad in accordance with an invention protected by a British patent and to be delivered abroad is a "vending" of the invention within the meaning of the patent. I am of opinion that it is not.

All letters patent for inventions are granted under the power reserved to the Crown by the well-known proviso in the Statute of Monopolies (21 Jac. 1, c. 3, s. 6). The words are "letters patent and grant of privilege of the sole working or making of new manufactures within the realm," and nothing is said about vending. But for a long time before the Act of 1883 it had been usual to grant the right "to make, use, exercise and vend the said invention" in letters patent, and that form has now been sanctioned by the Act of 1883. It has also been decided in a number of cases that to sell and deliver in this country the product of the invention was an infringement of the monopoly granted, whether such product was made in this country or abroad. James L.J. says in *Elmslie* v. *Boursier* (1): "I am of opinion, in this case, that the obtaining from abroad and selling in this country an article manufactured according to the specification of a patent, is a violation of the privileges granted by the letters patent." And the cases of *Wright* v. *Hitchcock* (2) and *Van Heyden* v. *Neustadt* (3) were to the same effect. But I am not aware of any case where a person was held to have infringed by selling foreign-made goods not to be delivered to the purchaser in this country.

I am of opinion that the exclusive right of "vending the invention" in the statutory form of patent must be construed consistently with the language of the Statute of Monopolies, and, with regard to the general purpose of the patent, to give the inventor the full benefit of his invention in this country. It must be such a vending as will be in a sense a working or use and exercise of the invention in this country or an appropriation by the vendor of some advantage which the patentee can derive from such use and exercise. A contract to deliver the goods

(1) (1869) 9 Eq. 217, at p. 223. (2) (1870) L. R. 5 Ex. 37, at p. 47.
(3) (1880) 14 Ch. D. 230.

abroad does not in any way interfere with the patentee's rights to work and utilize his invention in this country. It is a contract to do a perfectly lawful act, and whether the contract be made in this country or abroad does not in itself affect the patentee's monopoly of working his invention. Nor is it material to consider whether or when the property in the goods passed to the purchaser. It is lawful to be the owner of the goods if made and situate abroad, and neither the vendor nor the purchaser in my opinion thereby infringes the patent. The goods may or may not be afterwards brought into this country, and a different question will then arise, but that is no concern of the vendor after he has parted with them. I am of opinion that "vending the invention" in the common form of patent is confined to selling goods made or brought into this country, and that the respondent in this case has not, directly or indirectly, made, used or put in practice the appellants' invention within the meaning of the prohibition contained in the patent. In all essential particulars I think the case is covered by the decision of this House in *Badische Anilin und Soda Fabrik* v. *Basle Chemical Works.* (1)

I am therefore of opinion that the appeal fails, and should be dismissed.

Lord James of Hereford. My Lords, in this case the appellants have brought an action to recover damages from the respondent in consequence of an alleged breach of letters patent owned by the appellants. The letters patent referred to certain dyes, and conferred upon the patentee the sole privilege to make, use and vend the said invention within the United Kingdom. Proof was given at the trial that the defendant had, in this country, contracted with another person, also in this country, to sell a certain quantity of the patented dye. But this contract stipulated that the delivery of the article sold should take place not within the United Kingdom, but in Switzerland. The defendant then procured the article abroad, directing it to be delivered to his orders at Basle. He ordered the holder of the goods abroad to hold them to the order of the purchaser in

(1) [1898] A. C. 200.

H. L. (E.) 1906

BADISCHE ANILIN UND SODA FABRIK v. HICKSON.

Lord James.

England, and then the defendant communicated to the purchaser that the goods awaited his order at Basle.

Subsequently the goods were brought by the purchaser into the United Kingdom. But when this was done they had passed out of the control of the defendant.

The whole question is whether, on the above facts, the patent was infringed through a vending of the goods within the United Kingdom. I think not. So far as the defendant is involved, the goods never were within this country. Having regard to the intention and effect of the Statute of Monopolies, in which the word "vend" does not occur, it seems to me that the entering into a contract here to transfer goods abroad, coupled with no delivery by the defendant here, does not constitute a vending in respect of which a cause of action arises. The manufacture of the dye at Basle did not infringe the British patent. If by bought and sold notes made here it had been contracted that such goods at Basle should be transferred for use there, it would be somewhat difficult to contend that an action would lie here; and yet no more actionable element exists in this case. The appellants sustain no actionable injury until the goods arrive in this country, when an action will lie against any one who "uses or exercises" the said invention. As the defendant has not so done, I am of opinion that he is free from liability. So far as authority exists on the subject, it supports this view.

LORD ROBERTSON. My Lords, I agree with the judgment of my noble and learned friend Lord Davey.

LORD ATKINSON. My Lords, under the English law as distinct from the civil law, the property in a specific and ascertained chattel may be passed on a contract of sale for valuable consideration without delivery. Whether it does so pass or not will in each instance depend on the intention of the parties as ascertained by the terms of the contract, their conduct, and the circumstances of the case: *Dixon* v. *Yates* (1); *Seath & Co.* v. *Moore*. (2)

It is therefore possible for a vendor and vendee of such a chattel situate abroad to enter, in England, into a contract of

(1) (1833) 5 B. & Ad. 313. (2) (1886) 11 App. Cas. 350, 370.

sale by which the property in that chattel is passed from the one to the other, though the chattel itself never was intended to be delivered in any part of the three kingdoms, and never was, in fact, delivered there.

Mr. Cripps insisted that, in addition to the contract of sale, an appropriation was necessary to pass the property, but in the case of the sale of a specific and ascertained article this appropriation need only be a mental act of the contracting parties, performed by them in England; so that the broad principle contended for in this case is, as I understand it, in reality this, that if the specific and ascertained article the subject of such a sale happen to be an article of a kind protected by a patent granted in England, giving the patentee the sole right to "make, use, exercise and vend" his invention within the realm in Form D, Sched. I., Patent Designs and Trade Marks Acts of 1883, s. 33, the sale would, where nothing remains to be done outside the realm to pass the property, be an infringement of the patentee's right, inasmuch as it would amount to a vending of his invention within the realm.

The article sold in this case was no doubt imported into this country by the vendee, but he was sued for this infringement as all persons can be sued who thus "exercise and use" the invention within the realm, and, having no defence, he submitted; but delivery in England was no part of the contract of sale, and the argument in support of the vendor's liability in this case was not confined to cases where delivery is made or is intended to be made within the United Kingdom. If it be sound at all, it must equally apply to cases where such a delivery was neither made nor contemplated. The statute of 1883 above mentioned does not repeal the Statute of Monopolies (21 Jac. 1, c. 3), or confer upon the Crown power to grant patents which would be void under the earlier enactment.

The mischief this latter statute was aimed at, and the object it was designed to effect, appear clearly on the face of its 1st and 6th sections. The 1st section, after reciting the King's declaration that "all grants of monopolies are contrary to law," proceeded to enact, amongst other things, that "all licences and letters patent heretofore made, or hereafter to be made or

H. L. (E.) 1906

BADISCHE ANILIN UND SODA FABRIK v. HICKSON.

Lord Atkinson.

granted . . . . for the sole buying, selling, making, working or using of anything within this realm or the dominion of Wales, or of any other monopolies," should be void and of none effect.

The two most serious grievances which it was apparently considered the granting of monopolies could inflict upon His Majesty's subjects were, first, the exclusion of all those subjects other than the grantees and their licensees, from the manufacturing of or the trading in the commodities the subject-matter of the monopoly; and, secondly, by the prohibition of all competition, the raising or keeping up of the price of the patented articles upon the consumers within the realm.

The 6th section was passed in the interest of invention at the cost of prolonging those grievances for periods of fourteen years. It takes the form of a proviso, and enacts that the "declaration" mentioned in the 1st section "shall not extend to any letters patent . . . . of 'the sole working or making' of any manner of new manufacture within this realm to the true and first inventor or inventors of such manufactures which others at the time of making such letters patent and grant shall not use, so as also they be not contrary to law nor mischievous to the State by raising the price of commodities at home or hurt of trade or generally inconvenient."

This section does not contain the word "vend" or any equivalent word. It is in its terms confined to two operations, the working and making of new manufactures, both of which must under those terms take place within the realm. And it, on its face, apparently restricts the power of the Crown to the granting of the sole right or privilege of conducting these two operations. But inasmuch as it is legitimate and proper in the construction of statutes to have regard to the mischief requiring to be cured, the nature of the remedy provided, and the objects aimed at by the Legislature, and to interpret them as far as possible so as to further and effect those objects—see Lord Blackburn's Judgment, *River Wear Commissioners* v. *Adamson* (1)—it was in *Van Heyden* v. *Newstadt* (2) decided by the Court of Appeal, in conformity with some earlier authorities, that, as the Crown's power to grant the sole privilege of "working or making

(1) (1877) 2 App. Cas. 763. (2) (1880) 14 Ch. D. 230.

the new manufacture within the realm" was saved, there was saved with it and as ancillary to it the power to make that privilege effectually profitable to the true inventor by conferring upon him also the exclusive right to sell the commodity so manufactured.

The exclusive right or privilege of sale conferred upon a patentee by the Crown in exercise of this implied power is not the exclusive right to sell within this realm articles made by others and situated elsewhere, though produced by a process precisely similar to that described in his patent, but is on the contrary, it would appear to me, the exclusive right to sell within this realm the commodity produced by him here by that process of manufacture which he alone is authorized to carry on within the realm.

And it is, moreover, quite obvious that a contract entered into in England for the sale of a specific ascertained chattel situated abroad, of a kind and nature protected here by patent but never imported into this country, can no more deprive the patentee of his profits, "raise the price of the article at home, hurt trade here, or cause general inconvenience" to the community in these kingdoms—the very evils struck at by the Statute of Monopolies—than would the same contract if entered into abroad. The two transactions are indeed equally outside the purview of this statute. Numerous cases are collected in Maxwell on Statutes, 4th ed. pp. 130–146, in which the general words of statutes were held to be restricted to the specific object aimed at, where it is evident that a literal interpretation of the language used would have carried the operation of the Act beyond the intention of the Legislature in passing it.

It will suffice to take one case as an example. In *Philpotts* v. *Philpotts* (1) it was held that a conveyance of property knowingly made for the purpose of giving a vote, contrary to the 7 & 8 Will. 3, c. 25, s. 7, which declares such conveyances void and of none effect, is void so far as the right of voting is concerned, but in other respects as between the parties valid so as to pass the property.

I think the language of the Act of 1883 and of this patent

(1) (1850) 10 C. B. 85.

H. L. (E.) 1906 BADISCHE ANILIN UND SODA FABRIK v. HICKSON. Lord Atkinson.

must be construed on this principle: that is, their general words must in their operation be restricted to those matters which come within the purview of that earlier legislation, by virtue of which alone the power to make these patent grants is still preserved to the Crown. And, if that be so, in my opinion the sale which took place in this case cannot be held to be a vending, within the meaning of the patent, of the patentee's invention within the realm, or by consequence an infringement of his rights.

I therefore think that the decision of the Court of Appeal was right, and that this appeal should be dismissed with costs.

Order of the Court of Appeal affirmed and appeal dismissed with costs.

Lords' Journals, June 19, 1906.

Solicitors: *J. H. & J. Y. Johnson; Emmet & Co., for Rawnsley & Peacock, Bradford.*

[HOUSE OF LORDS.]

H. L. (E.) 1906 *June* 22.

CAVALIER (PAUPER) . . . . . APPELLANT;

AND

POPE . . . . . RESPONDENT.

Landlord and Tenant—Unfurnished House—Defective Premises—Promise by Landlord to Repair—Personal Injury to Tenant's Wife—Landlord not Liable.

Reversed by s. 4(1) Occupiers Liability Act 1957

The owner of a dilapidated house contracted with his tenant to repair it, but failed to do so. The tenant's wife, who lived in the house and was well aware of the danger, was injured by an accident caused by the want of repair:—

Held that the wife, being a stranger to the contract, had no claim for damages against the owner.

The decision of the Court of Appeal, [1905] 2 K. B. 757, affirmed.

THE appellant lived with her husband in a house owned by the respondent, and let by him to the husband unfurnished upon a verbal agreement. The flooring of the kitchen being out of

repair, the appellant and her husband threatened to leave, but stayed on, upon a promise by Cunnings, the respondent's agent, that the respondent would repair the flooring. No repairs were done, and one day the appellant fell through the flooring and hurt herself. The appellant and her husband having brought an action against the respondent for damages, it was proved at the trial, before Phillimore J. and a common jury, that the house was in a dangerous state of dilapidation when it was let, and that the contract to repair the flooring was made with the appellant's husband. In answer to questions by the learned judge, the jury found that Cunnings had notice or knowledge before the accident that the floor was out of repair and promised to repair it, and that he was acting within the scope of his authority, and they returned a verdict for 75*l.* damages for the appellant and 25*l.* for her husband. The learned judge entered judgment accordingly. The Court of Appeal (Collins M.R. and Romer L.J., Mathew L.J. dissenting) reversed this decision as to the 75*l.*, and entered judgment for the defendant as to the appellant's claim. Hence the present appeal.

May 29. *Wilshere* (*E. F. Lever* with him), for the appellant, used the arguments which failed to satisfy the majority of the Court of Appeal, and which are reported below so clearly and fully that they need not be repeated here. In addition it was urged that the promise to repair was a statement of intention amounting to a misrepresentation of fact and a fraud, and *Edgington* v. *FitzMaurice* (1) was cited.

Montague Lush, K.C., and *C. W. Lilley*, for the respondent.

Wilshere in reply.

The House took time for consideration.

June 22. Lord Loreburn L.C. My Lords, in my opinion the judgment of the Court of Appeal ought to be affirmed. I can find no right of action in the wife of the tenant against the landlord either for letting the premises in a dangerous state or for failing to repair them according to his promise. The husband

(1) (1885) 29 Ch. D. 459.

H. L. (E.) 1906

CAVALIER v. POPE.

has sued successfully for breach of contract, but the wife was not party to any contract. Accordingly the appeal fails.

LORD MACNAGHTEN. My Lords, notwithstanding the opinion of Mathew L.J., and the able argument of the learned counsel for the appellant, I am of opinion that the judgment of the Master of the Rolls and Romer L.J. must be upheld.

The facts are not in dispute. The law laid down by the Court of Common Pleas in the passage quoted by the Master of the Rolls from the judgment of Erle C.J. in *Robbins* v. *Jones* (1) is beyond question: "A landlord who lets a house in a dangerous state is not liable to the tenant's customers or guests for accidents happening during the term: for, fraud apart, there is no law against letting a tumble-down house; and the tenant's remedy is upon his contract, if any."

In this case the husband was the tenant. The wife, who was not the tenant, cannot be in a better position to recover damages than a customer or guest. Her position is, perhaps, less favourable. She had the advantage or disadvantage of knowing more about the state of the house than any guest or customer could have known.

The landlord's agent, with whom all the negotiations about repairs passed, seems to have been, as Phillimore J. says, "a very unsatisfactory agent," and it may be that he had no serious intention of doing the repairs he promised. But that is not fraud within the meaning of the word "fraud" in the rule laid down by the Chief Justice.

I think the appeal must be dismissed.

I have been asked by my noble and learned friend Lord Davey, who cannot be here this morning, to say that he concurs in this judgment.

LORD JAMES OF HEREFORD. My Lords, I have with regret arrived at the conclusion that this appeal must fail. In my opinion the verdict for the appellant cannot be maintained. There was but one contract, and that was made with the husband. The wife cannot sue upon it. Then is there any other form in

(1) (1863) 15 C. B. (N.S.) 221.

which her claim can be maintained? It was ably argued at the Bar that, as the premises belonged to the defendant, he must be taken to be in possession of them, and that, therefore, a duty arose to maintain them in a condition that would not cause injury to anyone who came upon them. But there seems to be a fallacy in this argument. The defendant was not in actual possession of the house in question, and did not occupy it. The plaintiffs were the occupiers, and the statement of claim so alleges. No duty is cast upon a landlord to effect internal repairs unless he contracts so to do.

Then all that remains on which to found liability is the contract, and it was urged that the contract to repair placed the premises constructively in the possession of the defendant and under his control. But the actual possession by the plaintiffs seems to negative this constructive control. The case so presented also does not come within the claim on the contract under which the husband has recovered. I therefore feel that the judgment of the majority of the Court of Appeal must be maintained. I regret this result, because the female plaintiff has been injured entirely through the failure of the defendant's agent to fulfil the contract he made. But moral responsibility, however clearly established, is not identical with legal liability.

LORD ROBERTSON. My Lords, I concur in the judgment of the Lord Chancellor.

LORD ATKINSON. My Lords, the question for decision in this case is, on the view of the facts most favourable to the appellant, whether a landlord who lets to a tenant an unfurnished house in a dangerous or dilapidated condition, contracts to put the premises into repair, and fails to perform his contract, is responsible in damages to the tenant's wife, who was fully aware of their state and with whom he has not made any contract, for injuries sustained by her by reason of this condition.

No question was left to the jury as to whether Cunnings had made to any one any statement amounting to a representation of fact. It was contended, as I understood, that the finding that Cunnings had, before the accident, promised to repair the

H. L. (E.) 1906 CAVALIER v. POPE. Lord Atkinson.

kitchen floor amounted in effect to a finding that he had represented that he intended to make the repairs, but, even if that be so, no question was left to the jury as to whether that intention was not, at the time the promise was made, honestly entertained by him. And, speaking for myself, I may say that I am unable to understand how the representation of the existence of a present intention to do a certain act at some future time, unless it amounts to a contract, and contract with the appellant in this case it was found there was none, can create any legal obligation whatever. Notwithstanding the facts and circumstances, it was sought by the appellant's counsel to bring the case within some one of the three distinct and different principles established by three separate lines of authority following, namely: first, the principle established by the cases of which *Nelson* v. *Liverpool Brewery Co.* (1) may be taken as an example; secondly, the principle of *Indermaur* v. *Dames* (2); and, lastly, the principle of *Langridge* v. *Levy* (3) and *George* v. *Skivington.* (4)

If this case comes within any of these principles it must be because of the existence of the agreement to repair, since it is well established that no duty is, at law, cast upon a landlord not to let a house in a dangerous or dilapidated condition, and further, that if he does let it while in such a condition, he is not thereby rendered liable in damages for injuries which may be sustained by the tenant, his (the tenant's) servants, guests, customers, or others invited by him to enter the premises by reason of this defective condition: *Robbins* v. *Jones* (5); *Lane* v. *Cox.* (6)

It is, I think, clear that the case does not come within the principle of *Indermaur* v. *Dames* (2) and the cases which followed it down to *Earl* v. *Lubbock* (7), because one of the essential facts necessary to bring a case within that principle is that the injured person must not have had knowledge or notice of the existence of the danger through which he has suffered. If he knows of the danger and runs the risk he has no cause of action. Neither

(1) (1877) 2 C. P. D. 311.
(2) (1866) L. R. 1 C. P. 274; (1867) 2 C. P. 311.
(3) (1837) 2 M. & W. 519.
(4) (1869) L. R. 5 Ex. 1.
(5) (1863) 15 C. B. (N.S.) 221.
(6) [1897] 1 Q. B. 415.
(7) [1905] 1 K. B. 253.

can the case, in my opinion, fall within the principle of *Langridge* v. *Levy* (1) or of *George* v. *Skivington*. (2) There is here, to use the words of Collins M.R., neither fraud, misrepresentation, nor warranty, nor the handing over of a thing known to be dangerous without warning. In both these latter cases the defendant represented that the article sold was fit and proper for the purposes for which it was contemplated that it should be used, and the party injured was ignorant of its unfitness for those purposes.

The existence of the contract to repair cannot on this point, therefore, so far as these two authorities are concerned, make any difference. The liability of the defendant to the appellant must be precisely the same as in *Robbins* v. *Jones* (3) and *Lane* v. *Cox* (4), where no such agreement was entered into. The learned judge at the trial based his decision in favour of the appellant on the decision in *Payne* v. *Rogers* (5) and the language employed by Lopes J., as he then was, in delivering judgment in *Nelson* v. *Liverpool Brewery Co.* (6) The Court of Appeal were of opinion that these authorities did not apply, and, with all respect to Phillimore J., I think the Court of Appeal were absolutely right. It was insisted upon by the appellant's counsel that the premises were under the control of the landlord because of his agreement to repair. I have been quite unable to follow the reasoning by which that conclusion has been arrived at. In *Miller* v. *Hancock* (7) and *Hargroves, Aronson & Co.* v. *Hartopp* (8) the landlord was held liable because control was retained by him; but the power of control necessary to raise the duty, for a breach of which damages were recovered in the several cases to which we have been referred, implies something more than the right or liability to repair the premises. It implies the power and the right to admit people to the premises and to exclude people from them. But this power and this right belong to the tenant, not to the landlord, and the latter's contract to repair cannot transfer them to him. The existence

(1) 2 M. & W. 519.
(2) L. R. 5 Ex. 1.
(3) 15 C. B. (N.S.) 221.
(4) [1897] 1 Q. B. 415.
(5) (1794) 2 H. Bl. 350.
(6) 2 C. P. D. 311.
(7) [1893] 2 Q. B. 177.
(8) [1905] 1 K. B. 472.

H. L. (E.) 1906 CAVALIER v. POPE.

of such an agreement may entitle a landlord to demand from his tenant admission to the premises for the servants and workmen required to carry out his contract, but nothing in the shape of control.

For these reasons I think the judgment of the Court of Appeal was right, and that the appeal should be dismissed.

Order of the Court of Appeal affirmed, and appeal dismissed.

Lords' Journals, June 22, 1906.

Solicitors: *John Davis; R. Chapman.*

[HOUSE OF LORDS.]

H. L. (E.) 1906 *June* 29.

NATIONAL ASSOCIATION OF OPERATIVE PLASTERERS AND OTHERS . . . . . } APPELLANTS;

AND

SMITHIES . . . . . RESPONDENT.

Practice—Discovery—Affidavit of Documents—Conspiracy—Criminal Offence.

In an action for damages for a conspiracy to induce workmen to break their contracts with the plaintiff the defendant cannot refuse to discover the material documents on the ground that they may tend to incriminate him.

THE respondent brought an action against the appellants for conspiring to induce workmen to break their contracts with him, claiming damages and an injunction. The Master in chambers made the usual order for an affidavit of documents by the defendants, and this order was affirmed by the judge in chambers, and again by the Court of Appeal (Collins M.R. and Romer L.J.), on the ground that they were bound by the decision in *Spokes* v. *Grosvenor Hotel Co.* (1) Hence this appeal.

S. T. Evans, K.C., and *Clement Edwards*, for the appellants. According to the rule of practice in the Court of Chancery before

(1) [1897] 2 Q. B. 124.

1873 a bill of discovery was demurrable in aid of an action at law which alleged facts disclosing a criminal offence. The same rule must prevail notwithstanding the Judicature Act, 1873. The old authorities in equity are unanimous that discovery will not be ordered where it might subject a person to pains and penalties. This action is for an indictable conspiracy, and the appellants are asked to produce a whole series of documents and to answer on oath as to their character. In *East India Co.* v. *Campbell* (1) it is said: "The rule is that this Court shall not oblige one to discover that which if he answers in the affirmative will subject him to the punishment of a crime." To the same effect is *Cartwright* v. *Green.* (2) In *Paxton* v. *Douglas* (3) the protection is said to be general against compulsion to answer a question which might be one step towards such a result. The same principle is applied to a possible case of penalties or forfeiture in *Maccallum* v. *Turton* (4) and in *Orme* v. *Crockford.* (5) Modern cases are *Alabaster* v. *Harness* (6), where interrogatories were disallowed as leading to a possible charge of maintenance; *Jones* v. *Jones* (7), rescue of distrained chattels; *Earl of Mexborough* v. *Whitwood District Council* (8), forfeiture of a lease.

[Lord Atkinson referred to *Ex parte Reynolds.* (9)]

In *Hill* v. *Campbell* (10) the power to grant inspection was held limited to the old practice in equity. In *Redfern* v. *Redfern* (11) discovery which might tend to prove adultery was disallowed. In *Martin* v. *Treacher* (12) interrogatories were disallowed in an action for penalties under the Public Health Act, 1875. *Ramsden* v. *Brearley* (13) was a legislative exception—proving the rule—under 6 & 7 Will. 4, c. 76, s. 19, requiring the disclosure of the printer or publisher of a newspaper.

A new departure in the wrong direction was made in *Fisher* v. *Owen* (14), where possibly incriminating interrogatories were allowed, and the remedy of the defendant was declared to be

(1) (1749) 1 Ves. Sen. 247.
(2) (1803) 8 Ves. 405.
(3) (1812) 19 Ves. 225.
(4) (1828) 2 Y. & J. 183.
(5) (1824) 13 Price, 376.
(6) (1894) 70 L. T. 375.
(7) (1889) 22 Q. B. D. 425.
(8) [1897] 2 Q. B. 111.
(9) (1882) 20 Ch. D. 294.
(10) (1875) L. R. 10 C. P. 222.
(11) [1891] P. 139.
(12) (1886) 16 Q. B. D. 507.
(13) (1875) 33 L. T. 322.
(14) (1878) 8 Ch. D. 645.

H. L. (E.) 1906 — NATIONAL ASSOCIATION OF OPERATIVE PLASTERERS v. SMITHIES.

refusal to answer. This was followed and approved in *Allhusen* v. *Labouchere*. (1) In *Spokes* v. *Grosvenor Hotel Co.* (2) similar principles were applied to discovery, and it was held that the objection could only be taken to the production of the obnoxious documents, not to the order of discovery itself, and that the objection must be on oath. It is submitted that the decision in that case was wrong and ought to be overruled.

Lush, *K.C.*, and *McCardie*, for the respondent, were not heard.

LORD LOREBURN L.C. My Lords, this is an appeal from a decision of the Court of Appeal, which affirmed a decision of the learned judge, Bucknill J., and also of the Master.

The effect of the order appealed against is that the defendants were required to state on affidavit "what documents are or have been in their possession or power relating to the matters in question in this action." This appeal was really rested on two grounds, the first only faintly relied upon—namely, that assuming that the Court had power to make the order in question, yet it ought not to have made the order in question as a matter of discretion. That was a very difficult ground of appeal to sustain, because nothing but an extremely exceptional case would warrant this House in interfering with the exercise of discretion by three successive tribunals in a matter which rested on discretion. It is sufficient to say that I do not think we can interpose in any way upon that ground.

The second ground, which really was the important and main ground of Mr. Evans' argument, was that in a case of this kind, which involved a charge of conspiracy, no order for an affidavit of documents could be made. That would be a very far-reaching proposition. I have listened with attention to the able statement of the cases by Mr. Evans, but he has not satisfied me that this ever was the law or the practice in Chancery, and certainly it would come as a surprise to a great many of those who have practised in the Courts of common law.

In my opinion the judgment appealed from is right, and the appeal ought to be dismissed with costs.

(1) (1878) 3 Q. B. D. 654. (2) [1897] 2 Q. B. 124.

LORD MACNAGHTEN. My Lords, I am of the same opinion. I do not think there is the slightest ground for this appeal.

I think the law is laid down, and the practice of the Court of Chancery is correctly described, in the judgments of Cotton and James L.JJ. in *Allhusen* v. *Labouchere*. (1) What Cotton L.J. says there is: "It always has been the practice of the Court of Chancery, and that practice is now, under the Act of 1873, s. 25, sub-s. 11, universal, that it is no objection to an interrogatory and no ground for taking the interrogatory off the file, if relevant, that the answer might tend to incriminate the party to whom it is exhibited. He may say, if he thinks fit, 'I refuse to answer on the ground that the answer may tend to criminate me'; but then he must take the objection on his oath, and if he does raise that objection on his oath in the proper way he is not bound to answer the interrogatory."

In this particular case there is no interrogatory tending to criminate the defendant. He is merely called upon to say whether he has any documents relevant to the matters in question; and it has been argued that he is entitled to reply, "I have a bundle of documents; I will not tell you what they are, but I think some of them may possibly tend to incriminate me." The answer in my opinion is absurd.

LORD JAMES OF HEREFORD. My Lords, I entirely concur in the result arrived at by my noble and learned friends.

The argument at the Bar, if acted upon, would really carry the decisions of the Court almost to the position of absurdity. The argument was that in every action capable of having two aspects, one of which would be criminal, no order for discovery could be obtained. Thus, taking the instance given, in an action brought for libel where discovery was sought, it would be sufficient for the person against whom the discovery was sought simply to make answer and say, "This is an action in which a criminal aspect may present itself, and therefore I am entitled not to answer or make discovery." Why in an action like this there should be an entirely new objection to discovery, without good cause for it, I do not know. In the instances given the

(1) 3 Q. B. D. 654, 666.

H. L. (E.) 1906

NATIONAL ASSOCIATION OF OPERATIVE PLASTERERS v. SMITHIES.

Lord James.

reason why Courts of Equity would not relieve in actions of forfeiture and penalties was not made very clear at the Bar, but I should suppose it was this, that the Courts of Equity were so averse to actions of that nature being brought at all that they would not assist them, and therefore they did not allow discovery to be obtained. But in the action we are dealing with here no such natural objection can possibly be found. If this argument were acted upon the immunity from discovery would go infinitely further, as was pointed out in the course of the argument, than is accorded to a witness. If a witness says, "I decline to answer this question because it would tend to criminate me," he does not escape by so saying, unless he can satisfy the Court that there is reasonable ground for the objection being made. Here all that the defendant is asked to do is to make a statement and say, "This will tend to criminate me if I give an answer." If he makes that statement the Court will have to deal with the answer so given. But the argument goes much further than that, and relies upon the nature of the action itself as giving immunity from making an answer.

In addition to this very strong reason why this appeal should be dismissed, I entirely agree with what my noble and learned friend the Lord Chancellor has said, that this case is concluded by authority. *Spokes* v. *Grosvenor Hotel Co.* (1) really determined the question we have now to decide; and I think there is no reason whatever for overruling that case.

Lord Robertson. My Lords, I agree that the judgment appealed from is sound.

Lord Atkinson. My Lords, I concur.

Order of the Court of Appeal affirmed, and appeal dismissed with costs.

Lords' Journals, June 29, 1906.

Solicitors: *Pattinson & Brewer; Ward, Bowie & Co., for T. W. Walthall, Birmingham.*

(1) [1897] 2 Q. B. 124.

[HOUSE OF LORDS.]

RUBEN AND ANOTHER . . . . . APPELLANTS;

AND

GREAT FINGALL CONSOLIDATED AND OTHERS . . . . . RESPONDENTS.

H. L. (E.) 1906 *July* 19.

Company—Share Certificate fraudulently issued by Secretary—Forgery—Master and Servant—Scope of Employment—Estoppel.

The appellants advanced in good faith a sum of money to the secretary of the respondent company for his own purposes on the security of a share certificate of the company issued to them by the secretary certifying that the appellants were registered in the company's register of shareholders as transferees of shares. This certificate was, in point of form, in accordance with the company's articles of association, inasmuch as it bore the seal of the company, and appeared to be signed by two of the directors and counter-signed by the secretary. The seal of the company was, however, affixed to it by the secretary fraudulently and without authority, and the signatures of the two directors were forged by him. In an action against the company for damages for refusing to register the appellants as owners of the shares:—

Held that, in the absence of any evidence that the company ever held out the secretary as having authority in this behalf to do anything more than the mere ministerial act of delivering share certificates, when duly made, to the owners of shares, the company were not estopped by the forged certificate from disputing the claim of the appellants, or responsible to them for the wrongful action of their secretary.

Decision of the Court of Appeal, [1904] 2 K. B. 712, affirmed.

Shaw v. *Port Philip Gold Mining Co.*, (1884) 13 Q. B. D. 103, discussed.

THE facts of this appeal are stated in the judgment of Lord Loreburn L.C.

June 14, 15, 18. *Isaacs, K.C.*, and *Danckwerts, K.C.* (*J. D. Crawford* with them), for the appellants. The certificate was perfectly regular in form. It was issued by the secretary, whose signature it bore, and there were also the apparent signatures of two directors. There arises from this transaction either a warranty of title or an estoppel against the company. On either alternative the appellants had a good cause of action against the respondents. The principle of *In re Bahia and San*

H. L. (E.) 1906 RUBEN v. GREAT FINGALL CONSOLIDATED.

Francisco Ry. Co. (1) applies. Here, as there, a statement was made on the part of the company by the proper authority and intended to be acted upon. This was held to be an estoppel against the company: see per Cockburn C.J. at p. 594; and Blackburn J. at p. 597. That decision was expressly approved by Lord Herschell in *Balkis Consolidated Co.* v. *Tomkinson.* (2) *Shaw* v. *Port Philip Gold Mining Co.* (3) was precisely this case—the genuine signature of the secretary and a forged signature of a director. Stephen J. said the secretary's "acts amount to a warranty by them (the company) of the genuineness of the certificate issued by him." That case was cited without disapproval in *Balkis Consolidated Co.* v. *Tomkinson.* (2) The principle expressed by Willes J. in *Barwick* v. *English Joint Stock Bank* (4) is applicable to the present case. "The general rule," he said, "is that the master is answerable for every such wrong of the servant or agent as is committed in the course of the service, and for the master's benefit, though no express command or privity of the master be proved." The learned judge gives a number of illustrations where "the master has not authorized the particular act," but is still liable. The words "for the master's benefit" do not mean that the master necessarily is benefited, but that the act is one of the class which the servant has to do. Thus a railway servant might give a man into custody because he disliked, not because he suspected him. The company would still be liable to an action for false imprisonment. Willes J. also said: "No sensible distinction can be drawn between the case of fraud and any other wrong." This doctrine was expressly approved by Lord Selborne in *Houldsworth* v. *City of Glasgow Bank* (5), and in *Mackay* v. *Commercial Bank of New Brunswick.* (6) *British Mutual Banking Co.* v. *Charnwood Forest Ry. Co.* (7) was cited against the appellants. In that case a company was held not to be liable for fraudulent statements made by its secretary for his own ends. But there the secretary purported to act beyond

(1) (1868) L. R. 3 Q. B. 584.
(2) [1893] A. C. 396, 405.
(3) 13 Q. B. D. 103.
(4) (1867) L. R. 2 Ex. 259, at p. 265.
(5) (1880) 5 App. Cas. 317, 327.
(6) (1874) 5 P. C. 394, 411.
(7) (1887) 18 Q. B. D. 714.

the powers of the company itself; and Bowen L.J. asked: "How can a company be made liable for a fraudulent answer given by their officer for his own private ends, by which they could not have been bound if they had actually authorized him to make it and promised to be bound by it?"

[LORD DAVEY referred to *Limpus* v. *London General Omnibus Co.* (1)]

That was a case of direct disobedience to the master's orders. The *Charnwood Forest Case* (2) is distinguishable; but Bowen L.J.'s language, if applied without qualification, would make it unsafe even to deal with an agent, and in *Barwick's Case* (3), which he proposed to follow, the master is said to be bound even by the fraud of his servant. In *Hambro* v. *Burnand* (4), in the Court of Appeal, the principal was held responsible for the act of his agent, though the latter acted in his own interest and not in that of his principal. In *Dyer* v. *Munday* (5) the master was held by the Court of Appeal liable to damages for an assault on the plaintiff by his servant, though it was a criminal act for which the servant had been convicted and fined.

What was done here amounted to a representation of the genuineness of the documents, and the case is covered by *Starkey* v. *Bank of England* (6): see also *County of Gloucester Bank* v. *Rudry Merthyr Steam and House Coal Colliery Co.* (7) and *Duck* v. *Tower Galvanizing Co.* (8) In *Mahony* v. *East Holyford Mining Co.* (9) the secretary had no authority at all. *Bank of Ireland* v. *Evans' Trustees* (10) was a case of estoppel by negligence, and has no application. *Whitechurch* v. *Cavanagh* (11) was a case, not of a certificate, but of certification not binding on the company.

[They also cited *Thorne* v. *Heard* (12) and *Knights* v. *Wiffen.* (13)]

(1) (1862) 1 H. & C. 526.
(2) 18 Q. B. D. 714.
(3) L. R. 2 Ex. 259.
(4) [1904] 2 K. B. 10.
(5) [1895] 1 Q. B. 742.
(6) [1903] A. C. 114.
(7) [1895] 1 Ch. 629, 633.
(8) [1901] 2 K. B. 314.
(9) (1875) L. R. 7 H. L. 869.
(10) (1855) 5 H. L. C. 389.
(11) [1902] A. C. 117.
(12) [1894] 1 Ch. 599; [1895] A. C. 495.
(13) (1870) L. R. 5 Q. B. 660, at p. 665.

H. L. (E.) 1906

RUBEN v. GREAT FINGALL CONSOLIDATED.

Sir R. B. Finlay, K.C., *Bankes, K.C.*, and *Bremner*, for the respondents, were not heard.

The House took time for consideration.

July 19. LORD LOREBURN L.C. My Lords, in this case Kennedy J. gave judgment in favour of the plaintiffs, the present appellants, but stated that his decision was governed entirely by the authority of a previous case, and that his own opinion was in favour of the defendants, the present respondents.

The Court of Appeal (Collins M.R., Stirling and Mathew L.JJ.) gave judgment in favour of the defendants, and in my opinion they arrived at a right conclusion.

The question arises out of the fraud and forgery of a man named Rowe. Rowe was secretary of the defendant company. He applied to the plaintiffs, who are stockbrokers, to procure for him a loan of 20,000*l.* in order to enable him to purchase 5000 shares in the defendant company. Accordingly the plaintiffs arranged with a firm of bankers to advance the money upon a transfer of the shares to the plaintiffs' names. Rowe forged a transfer in the name of one Storey as transferor. The transfer was duly executed by the bankers as transferees, and then the plaintiffs delivered it to Rowe in exchange for a certificate. The certificate purported to state that the bankers were the registered proprietors of 5000 shares: it purported to be signed by two directors; the seal was affixed to it and it was countersigned by Rowe himself as secretary. In fact, the names of the two directors were forged by Rowe, and the company's seal was affixed by Rowe fraudulently, and not for or on behalf of or for the benefit of the defendant company, but solely for himself and for his own private purposes and advantage. Upon this the bankers advanced 20,000*l.* When the fraud was discovered the plaintiffs were obliged to repay to the bank the sum of 20,000*l.*, and brought this action against the defendant company upon the ground that they were liable for the fraud of Rowe. The action was for damages for refusing to register the plaintiffs as owners of the shares.

The only other circumstance needing notice is that Rowe was

admittedly a proper person to deliver certificates on behalf of the company.

I cannot see upon what principle your Lordships can hold that the defendants are liable in this action. The forged certificate is a pure nullity. It is quite true that persons dealing with limited liability companies are not bound to inquire into their indoor management, and will not be affected by irregularities of which they had no notice. But this doctrine, which is well established, applies only to irregularities that otherwise might affect a genuine transaction. It cannot apply to a forgery.

Another ground was pressed upon us, namely, that this certificate was delivered by Rowe in the course of his employment, and that delivery imported a representation or warranty that the certificate was genuine. He had not, nor was held out as having, authority to make any such representation or to give any such warranty. And certainly no such authority arises from the simple fact that he held the office of secretary and was a proper person to deliver certificates. Nor am I able to see how the defendant company is estopped from disputing the genuineness of this certificate. That, indeed, is only another way of stating the same contention. From beginning to end the company itself and its officers, with the exception of the secretary, had nothing to do either with the preparation or issue of the document.

No precedent has been quoted in support of the plaintiffs' contention except the case of *Shaw* v. *Port Philip Gold Mining Co.* (1) I agree with Stirling L.J. in regarding that decision as one that may possibly be upheld upon the supposition that the secretary there was, in fact, held out as having authority to warrant the genuineness of a certificate. If that be not so, then in my opinion the decision cannot be sustained.

For these reasons the judgment of the Court of Appeal ought in my view to be affirmed.

LORD MACNAGHTEN. My Lords, this case was argued at some length and with much ingenuity by the learned counsel for the appellants. In my opinion there is nothing in it.

(1) 13 Q. B. D. 103.

H. L. (E.) 1906 RUBEN v. GREAT FINGALL CONSOLIDATED. Lord Macnaghten.

Ruben and Ladenburg are the victims of a wicked fraud. No fault has been found with their conduct. But their claim against the respondent company is, I think, simply absurd.

The thing put forward as the foundation of their claim is a piece of paper which purports to be a certificate of shares in the company. This paper is false and fraudulent from beginning to end. The representation of the company's seal which appears upon it, though made by the impression of the real seal of the company, is counterfeit, and no better than a forgery. The signatures of the two directors which purport to authenticate the sealing are forgeries pure and simple. Every statement in the document is a lie. The only thing real about it is the signature of the secretary of the company, who was the sole author and perpetrator of the fraud. No one would suggest that this fraudulent certificate could of itself give rise to any right or bind or affect the company in any way. It is not the company's deed, and there is nothing to prevent the company from saying so.

Then how can the company be bound or affected by it? The directors have never said or done anything to represent or lead to the belief that this thing was the company's deed. Without such a representation there can be no estoppel.

The fact that this fraudulent certificate was concocted in the company's office and was uttered and sent forth by its author from the place of its origin cannot give it an efficacy which it does not intrinsically possess. The secretary of the company, who is a mere servant, may be the proper hand to deliver out certificates which the company issues in due course, but he can have no authority to guarantee the genuineness or validity of a document which is not the deed of the company.

I could have understood a claim on the part of the appellants if it were incumbent on the company to lock up their seal and guard it as a dangerous beast and if it were culpable carelessness on the part of the directors to commit the care of the seal to their secretary or any other official. That is a view which once commended itself to a jury, but it has been disposed of for good and all by the case of *Bank of Ireland* v. *Trustees of Evans' Charities* (1) in this House.

(1) 5 H. L. C. 389.

Of all the numerous cases that were cited in the opening none, I think, is to the point but *Shaw* v. *Port Philip Gold Mining Co.* (1), and that, as it seems to me, cannot be supported unless a forced and unreasonable construction be placed on the admissions which were made by the parties in that action.

I think the appeal must be dismissed with costs.

LORD DAVEY. My Lords, to use the language of a distinguished judge of the last generation, the appellants' case seems to me as full of holes as a colander. There is not a step in their title which is not tainted with fraud going to the root of it. Storey, whose name was used as transferor, had not 5000 shares to transfer, and his name was forged to the transfer. There were therefore no shares, and there was no transfer. The seal on the certificate was, indeed, a genuine impression of the company's seal, but it was placed there without any authority, and (as concisely stated by Lord Lindley in his work on Companies, 6th ed. p. 246) "A document of that kind, if there is any intent to defraud, is a forged instrument." The signatures of the two directors who purported to countersign were also forgeries.

The appellants have no doubt been grossly defrauded, but the question is whether they can shift the loss on to the shoulders of the innocent. The company has done literally nothing in the transaction, and could do nothing, because in no stage of the transaction did it come before the board of directors, which alone was entitled to speak and act for it. It is admitted that Rowe was the proper person to deliver certificates to those entitled to them. From this harmless proposition the appellants slide into another and a very different one, that it was the secretary's duty to warrant on behalf of the company the genuineness of the documents he delivered. There is no evidence that any such duty or power was, in fact, entrusted to Rowe, and it is too great a strain on my powers to ask me to imply it from the mere fact of his being the secretary or the proper person to deliver documents.

But, even if I could make the implication that the appellants desire, I do not think it would assist them, for I agree with the

(1) 13 Q. B. D. 103.

H. L. (E.) 1906

RUBEN v. GREAT FINGALL CONSOLIDATED.

Lord Davey.

learned judges in the Court of Appeal that every part of the legal proposition stated by Willes J. in his well-known judgment in *Barwick* v. *English Joint Stock Bank* (1) is of the essence of it. Willes J.'s words are these: "The general rule is that the master is answerable for every such wrong of the servant or agent as is committed in the course of the service and for the master's benefit." Where, therefore (as in the present case), the secretary is acting fraudulently for his own illegal purposes, no representation by him relating to the matter will bind his employers. And in my opinion it would be a matter of reproach if the law were otherwise. The reason for the qualification is that a representation made under such circumstances, whether express or implied, is also part of the same fraud, and cannot rightly be considered to be made by the servant as agent or on behalf of his master.

Finally, it is in my opinion open to serious doubt whether on the facts of the present case the parties relied on Rowe's representation at all. The evidence indicates that they refused to do so, because they declined to part with their money on Rowe's certifying the transfer (as it is called), and if they acted in reliance on the certificate apart from any representation their case, of course, fails, for nobody can pretend that the certificate itself created any estoppel against the company.

I guard myself from expressing any opinion whether, even if the certificate had been genuine but issued under some innocent mistake, it would have been an estoppel in favour of the present appellants. It will be remembered that the appellants themselves propounded the forged transfer to the company for registration of the supposed transferees' names. I share the doubt expressed by my noble and learned friend Lord Macnaghten in *Balkis Consolidated Co.* v. *Tomkinson* (2) "whether under such circumstances a person ought to be permitted to rely upon a representation innocently made to which he has in a sense and to a certain extent contributed." The recent decision of this House in *Mayor of Sheffield* v. *Barclay* (3) may be found to

(1) L. R. 2 Ex. 259, at p. 265. (2) [1893] A. C. 396, at p. 411.
(3) [1905] A. C. 392.

have some bearing upon this point. It is, however, unnecessary to express any opinion upon it on the present occasion.

I am of opinion that the appeal should be dismissed.

LORD JAMES OF HEREFORD. My Lords, concurring as I do entirely in the judgments that have been delivered by my noble and learned friends, I do not propose to add to them except to make one observation. This is one of the cases in which it is said that one of two innocent persons must suffer. I cannot help observing that the decision now about to be given may cause those who receive certificates in commercial life to be anxious and to be shaken in their confidence in respect of the validity of those certificates. But in this case the transferee has a safeguard which a company has not. A company cannot protect itself against the frauds of its secretary, and if the company has to bear the burden of this loss, of course the loss placed upon companies will be very great, and they must guard against it, but certainly theoretically—I do not know whether it is quite the case practically—the transferee has a safeguard, he can always apply to the two directors whose names appear on the certificate and inquire from them whether those signatures are valid and genuine signatures or not. If the answer is that they are genuine, the certificate of course is valid; if the answer is, "No, I have not signed that certificate," then he is aware that it is invalid. I do not know whether in commercial life transferees will take the trouble to inquire of directors whose signatures appear on certificates whether those signatures are genuine or not, but at any rate there is that power if they choose to exercise it.

LORD ROBERTSON. My Lords, I concur in the judgment proposed.

LORD ATKINSON. My Lords, I also concur.

Order of the Court of Appeal affirmed, and appeal dismissed with costs.

Lords' Journals, July 19, 1906.

Solicitors: *Gilbert Samuel & Co.; Ashurst, Morris, Crisp & Co.*

Dicta of LORD LOREBURN, L.C., and LORD DAVEY, at pp. 452, 453, *applied*. SMITH'S POTATO ESTATES, *v.* BOLLAND. [1948] 2 All E.R. 367.

[HOUSE OF LORDS.]

H. L. (E.) 1906

STRONG & CO., OF ROMSEY, LIMITED . APPELLANTS

AND

July 20.

WOODIFIELD (SURVEYOR OF TAXES) . . . . RESPONDENT.

Revenue—Income Tax—Trade—Balance of Profits — Deductions — Expenses incurred in earning Profits—Loss arising from Negligence —Hotel—Injury to Guest—Damages—Income Tax Act, 1842 (5 & 6 *Vict. c.* 35), *s.* 100; *Sched. D.*

pplied. INLAND REV. COMMRS. *v.* OWDALL O'MAHONY & CO. LD. [1952] A.C. 401

A brewery company owned an inn which was carried on by a manager as part of their business. A customer sleeping in the inn was injured by the fall of a chimney, and recovered damages and costs against the company for the injury, which was owing to the negligence of the company's servants:—

Held, that the damages and costs could not be deducted in estimating the balance of profits for the purpose of the income tax, the loss not being connected with or arising out of the trade, and not being money wholly and exclusively laid out or expended for the purposes of the trade.

Decision of the Court of Appeal, [1905] 2 K. B. 350, affirmed.

THE facts indicated in the head-note were stated in a case by the Income Tax Commissioners, who disallowed the deduction claimed. This decision was reversed by Phillimore J., but re-established and confirmed by the Court of Appeal (Collins M.R., Mathew and Cozens-Hardy L.JJ.).

June 14. *Danckwerts, K.C.*, and *Bremner* (*P. G. Henriques* with them), for the appellants. The tax is payable only upon the balance of the profits and gains—that is, upon the net profits arrived at after deducting the losses incurred in carrying on the business. The profits and gains were diminished by the amount of damages and costs incurred in the action; they were an incident to the business—an outlay necessarily incurred in the course of the trade. Negligence is inevitable in every business, and the loss sustained by negligence must be allowed for. By implication every kind of loss outside the specified exceptions may be deducted. Those exceptions are mentioned in the Third Rule of Sched. D. in the Act of 1842, which, as Lord Blackburn

observed in *Coltness Iron Co.* v. *Black* (1), "still continued to be negative in its form." That is to say, certain deductions were not to be allowed, but this claim for exemption is not excluded. The duties of an innkeeper are explained in *Sandys* v. *Florence.* (2) Among them is that of not being negligent of his guests, and the loss suffered by reason of such negligence is loss, without taking account of which there are no gains or profits. This is the principle laid down by Lord Macnaghten in *London County Council* v. *Attorney-General.*(3) "From this total income," he said, "the taxpayer was allowed to make a great many deductions. . . . . The total amount of deductions was to be subtracted from the total amount of income, and the difference was the 'income chargeable.'" So in *Gresham Life Assurance Society* v. *Styles* (4) Lord Herschell said, at p. 323: "The scheme of the Act obviously is to tax, not receipts, but profits properly so called"; or, as Lord Halsbury put it at p. 315, "the profits realized." In that case the appellants were allowed to deduct the sums annually paid in respect of annuity contracts. In like manner, in *Ashton Gas Co.* v. *Attorney-General* (5), Lord Halsbury, at p. 12, said: "The profit upon which the income tax is charged is what is left after you have paid all the necessary expenses to earn that profit." Here among those necessary expenses were the damages and costs of the action. All deductions are allowed except those which are forbidden. In *Reid's Brewery Co.* v. *Male* (6) bad debts incurred in a money-lending business were allowed. In *Russell* v. *Town and County Bank* (7) a deduction was allowed in respect of the annual value of the whole of the bank premises, including that part of them which was occupied by the manager. *Brickwood & Co.* v. *Reynolds* (8) is distinguishable, as the deduction claimed, but not allowed, was for the repair of premises not occupied for the purposes of their trade by the persons assessed, who were brewers. Equally inapplicable is *Mersey Docks and Harbour Board* v. *Lucas* (9), where no deduction was allowed for

(1) (1881) 6 App. Cas. 315, 333.
(2) (1878) 47 L. J. (C.P.) 598.
(3) [1901] A. C. 26, 37.
(4) [1892] A. C. 309.
(5) [1906] A. C. 10.
(6) [1891] 2 Q. B. 1.
(7) (1888) 13 App. Cas. 418.
(8) [1898] 1 Q. B. 95.
(9) (1883) 8 App. Cas. 891

H. L. (E.) 1906 STRONG & Co., LIMITED v. WOODIFIELD.

a sinking fund for the repayment of debt, the fund being in the nature of capital. For a similar reason no deduction was allowed for the exhaustion of capital in *Alianza Co., Ld.* v. *Bell.* (1) But in *Royal Insurance Co.* v. *Watson* (2) Lord Shand, in words, as Phillimore J. said, almost prophetic of this case, said: "There would have been much force in the argument that such a payment might properly form a deduction from gross profits" in "a case in which there has been wrongful dismissal of a person having an engagement for a term of years, and who succeeds in obtaining damages on that account." It is believed that railway companies make deductions of damages and costs in cases of accidents to passengers, though there is no reported case to that effect.

Sir J. Lawson Walton, A.-G., and *Sir R. B. Finlay, K.C.* (*W. Finlay* with them), for the respondent. Only such deductions can be allowed as are necessary to the ordinary conduct of a business—such outlay as is necessary to enable the trader to make his profits. Certainly the deduction could not be made in the year of assessment, as an average of three years must be taken. There was no doubt a loss, but not a loss incurred in carrying on the business. The negligence did not arise in the conduct of the business; and the damages and costs were not an expense incurred for the purpose of making profits. Under Rule 1, Cases 1 and 2, the deduction must be "money wholly and exclusively" laid out for the purposes of the trade. There is no evidence of any custom of railway companies to deduct damages and costs for accidents.

In *Coltness Iron Co.* v. *Black* (3), before the Court of Session, the Lord President points out that "the full amount of the balance of profits and gains" is not the same thing as "net profits." The State declines, he said, to allow deductions which would be found in an ordinary balance-sheet, such as, for example, interest on capital, and permits only an allowance for working expenses. In *Rhymney Iron Co.* v. *Fowler* (4) no deduction was allowed for a subscription to a coal owners' association formed to provide a fund against losses occasioned

(1) [1906] A. C. 18.
(2) [1897] A. C. 1, 9.
(3) (1881) 1 Tax Cases, 305, 307.
(4) [1896] 2 Q. B. 79.

by strikes. There Pollock B. used language similar to that of the Lord President in *Coltness Iron Co.* v. *Black* (1), and said that an item could not be allowed simply "because it is an item which would properly find its way into a profit and loss account between a man and his partners or as kept for himself." If the appellants' contention were admitted extraordinary consequences would follow. A newspaper would deduct damages for libel; a publican for fines; a doctor for expenses incurred through an illness contracted in attending a patient; a private person for the carelessness, involving damages, of the driver of his coach or motor car; or, as Mathew L.J. said below, for a chimney falling on a passenger. The only deductions are for outlay or loss directly and necessarily arising out of the business. It must not be in the nature of capital expenditure. In *City of London Contract Corporation, Ld.* v. *Styles* (2) it was held that the price paid for the unexecuted contracts of a company whose business has been taken over could not be allowed as a deduction from profits.

Danckwerts, K.C., in reply. The language quoted of Pollock B. and the Lord President does not furnish the right standard; all deductions are permissible which would appear in a balance-sheet. "The word 'profits,'" said Lord Halsbury, ". . . . is to be understood . . . . in a sense which no commercial man would misunderstand."

The House took time for consideration.

July 20. LORD LOREBURN L.C. My Lords, in this case the appellants are a brewery company who owned an inn and conducted it through a manager. A customer sleeping in the inn was injured by the falling of a chimney upon him, and the appellants had to pay 1490*l.* in costs and damages, because the fall of the chimney was due to the negligence of the appellants' servants, whose duty it was to see that the premises were in proper condition.

The appellants claim to deduct this sum of 1490*l.* from the amount of their profits and gains assessable to income tax, and

(1) 1 Tax Cases, 305, 307. (2) (1887) 2 Tax Cases, 244.

H. L. (E.) 1906 STRONG & Co., LIMITED v. WOODIFIELD. Lord Loreburn L.C.

the question is, whether the Commissioners were right in disallowing the deduction. The Court of Appeal held the Commissioners were right, and I am of the same opinion.

It is unnecessary to recite the different sections of the Income Tax Act, 1842, which govern the present appeal. They are s. 100, Sched. D, Case 1, Rule 1 and Rule 3, and Rule 1 of the rules applying to both the Cases 1 and 2. That which has to be assessed is the balance of the profits or gains of a trade; that is to say, the sum left after subtracting the proper deductions from the profits and gains. A deduction may be allowed on account of loss, and this is a loss. The Act does not affirmatively state what losses may be deducted. It furnishes merely negative information. A deduction cannot be allowed on account of loss not connected with or arising out of such trade. That is one indication. And no sum can be deducted unless it be money wholly and exclusively laid out or expended for the purposes of such trade. That is another indication. Beyond that the Act is silent.

In my opinion, however, it does not follow that if a loss is in any sense connected with the trade, it must always be allowed as a deduction; for it may be only remotely connected with the trade, or it may be connected with something else quite as much as or even more than with the trade. I think only such losses can be deducted as are connected with in the sense that they are really incidental to the trade itself. They cannot be deducted if they are mainly incidental to some other vocation or fall on the trader in some character other than that of trader. The nature of the trade is to be considered. To give an illustration, losses sustained by a railway company in compensating passengers for accidents in travelling might be deducted. On the other hand, if a man kept a grocer's shop, for keeping which a house is necessary, and one of the window shutters fell upon and injured a man walking in the street, the loss arising thereby to the grocer ought not to be deducted. Many cases might be put near the line, and no degree of ingenuity can frame a formula so precise and comprehensive as to solve at sight all the cases that may arise. In the present case I think that the loss sustained by the appellants was not really incidental to their trade as inn-

keepers, and fell upon them in their character not of traders, but of householders. Accordingly I think that this appeal must be dismissed.

LORD MACNAGHTEN. My Lords, I am of the same opinion.

LORD DAVEY. My Lords, the question in this appeal is whether a sum of 1490*l.*, which the appellants have had to pay for costs and damages occasioned to a person staying in their inn by the fall of a chimney, is a proper deduction in arriving at the profits of the appellants' trade for the purpose of the income tax. The answer to that question, in my opinion, depends on the answer to be given to another question, whether the deduction claimed was a disbursement or expense wholly and exclusively laid out or expended for the purpose of the appellants' trade within the meaning of Rule 1 applying to both Cases 1 and 2 of Sched. D in s. 100 of the Income Tax Act, 1842.

It has been argued that the deduction claimed was a loss connected with or arising out of the appellants' trade within Rule 3 applying to Case 1 only. Case 1 relates to trades, manufactures, adventures, or concerns in the nature of trade, and I think that the word "loss" in Rule 3 means what is usually known as a loss in trading or in speculation. It contemplates a case in which the result of the trading or adventure is a loss, wholly or partially, of the capital employed in it. I doubt whether the damages in the present case can properly be called a trading loss. I prefer to decide the case upon Rule 1, which applies to profits of trades and also to professions, employments, or vocations. I think that the payment of these damages was not money expended "for the purpose of the trade." These words are used in other rules, and appear to me to mean for the purpose of enabling a person to carry on and earn profits in the trade, &c. I think the disbursements permitted are such as are made for that purpose. It is not enough that the disbursement is made in the course of, or arises out of, or is connected with, the trade, or is made out of the profits of the trade. It must be made for the purpose of earning the profits. In short, I agree with the judgment of the Master of the Rolls.

I therefore think that the appeal should be dismissed with costs.

H. L. (E.) 1906 STRONG & Co., LIMITED v. WOODIFIELD.

LORD JAMES OF HEREFORD. My Lords, I confess I did entertain some doubts during the discussion of this case at the Bar, but they are not doubts sufficient to cause me to differ from the judgments which have been delivered.

In order to explain my position I may say that I concur entirely with the principle laid down by my noble and learned friend the Lord Chancellor. The only question is as to the application of that principle in one small matter to the facts of this case. If the fact were that the accident had occurred to a stranger walking in the street, then I should have no doubt at all. The doubt that did arise in my mind was as to the rule applicable when the accident occurred to a person who was a customer in the house who would not have been injured unless the business of an innkeeper was being carried on, and when it was in the course of the carrying on of a portion of that business that the customer injured was there; then I think a different principle might arise, and my doubts consequently existed. But, my Lords, my doubts are not strong enough, in relation to this application of a principle about which there is no question, to cause me to dissent from the judgment proposed.

LORD ROBERTSON. My Lords, I am clearly of opinion that the judgment is right.

LORD LOREBURN L.C. I have been requested by Lord Atkinson, who is unable to be present, to say that he concurs in the opinion I have offered to your Lordships.

Order of the Court of Appeal affirmed, and appeal dismissed with costs.

Lords' Journal, July 20, 1906.

Solicitors: *Metcalfe, Birkett & Rowlatt; Sir F. Gore, Solicitor of Inland Revenue.*

[HOUSE OF LORDS.]

DE BEERS CONSOLIDATED MINES, LIMITED . . . . . } APPELLANTS;

AND

HOWE (SURVEYOR OF TAXES) . . . . . RESPONDENT.

H. L. (E.) 1906 *July* 30.

Revenue—Income Tax—Residence—"Person residing in the United Kingdom"—Company registered Abroad—Head Office Abroad—General Meetings Abroad—Directors' Meetings in England and Abroad—Majority of Directors in England—Company's Business in England and Abroad—Income Tax Act, 1853 (16 & 17 *Vict. c.* 34), *s.* 2; *Sched. D.*

A foreign corporation may reside in this country for the purposes of income tax. The test of residence is not where it is registered, but where it really keeps house and does its real business. The real business is carried on where the central management and control actually abides.

Whether any particular case falls within that rule is a pure question of fact, to be determined not according to the construction of this or that regulation or by-law, but upon a scrutiny of the course of business and trading.

Decision of the Court of Appeal, [1905] 2 K. B. 612, affirmed.

THE facts upon which this appeal turned are fully and clearly stated in the report of the case below. For the purposes of the present report the judgment of Lord Loreburn L.C. is sufficient.

June 18, 19. *Cohen, K.C.*, and *Danckwerts, K.C.* (*F. Cassel* with them), for the appellants. The appellant company is not resident within the United Kingdom. A company incorporated by the law of a foreign country cannot be resident here within the meaning of Sched. D of the Act of 1853. But if to some extent a foreign company may reside here, this company is so constituted that it cannot be considered to be resident here. The first of these contentions is covered by *Attorney-General* v. *Alexander*. (1) In that case the Imperial Ottoman Bank was held to be resident at Constantinople, though it also carried on business here. Phillimore J. and the Court of Appeal confused the question of personal service of process with that of domicil or

(1) (1874) L. R. 10 Ex. 20.

H. L. (E.) 1906

DE BEERS CONSOLIDATED MINES, LIMITED v. HOWE.

residence. The two questions have nothing to do with each other; personal service does not depend on residence. The distinction is pointed out by Blackburn J. in *Newby* v. *Van Oppen and Colt's Patent Firearms Manufacturing Co.* (1) The mere circumstance that some trade is done in England may suffice for service, but not for taxation: *La Bourgogne.* (2) The mere temporary occupation of a stand at a show was held enough for service in *Dunlop Pneumatic Tyre Co.* v. *Actien-Gesellschaft für Motor und Motorfahrzeugbau vorm. Cudell & Co.* (3)

Wingate & Co. v. *Webber* (4) is an express decision that a foreign company cannot be resident within the United Kingdom; and its agents were taxed "without their relation to the company being expressly specified." A corporation is a legal persona whose only residence is the place of its incorporation, and a foreign company has no legal existence in this country. This is illustrated in the American authorities: *Bank of Augusta* v. *Earle* (5); *Blackstone Manufacturing Co.* v. *Inhabitants of Blackstone* (6); *Ohio and Mississippi Railroad Co.* v. *Wheeler.* (7) A company can only have one residence — the place of its foundation. Further, if there be no residence there can be no assessment. The seat of actual authority as fixed by this company's memorandum and articles is the criterion of residence, and that is fixed at Kimberley. The business of the company was conducted at Kimberley, where alone diamonds were delivered to purchasers. The appellants are miners, not merchants, and do not purchase diamonds for resale. The whole of their physical operations are in South Africa. All the general meetings are held at Kimberley, and all shareholders, if they desire to receive notice of these meetings, must have a registered address in South Africa. This distinguishes the case from *Goerz & Co.* v. *Bell.* (8) The company is taxed in South Africa. Further, the expression "carrying on business" imports habitual transactions. Stress is laid upon the word "habitually" and similar words in

(1) (1872) L. R. 7 Q. B. 293, 295.
(2) [1899] A. C. 431.
(3) [1902] 1 K. B. 342.
(4) (1897) 3 Tax Cases, 569; 34 Sc. L. R. 699.
(5) (1839) 13 Peters (U.S.), 519.
(6) (1859) 13 Gray (Mass.), 488.
(7) (1861) 1 Black (U.S.), 286.
(8) [1904] 2 K. B. 136.

Erichsen v. *Last* (1) by Jessel M.R. and Brett L.J., and in *Grainger* v. *Gough* (2) by Lord Herschell and Lord Watson. According to this test the appellants did not carry on business here, for during the years of assessment there were only two contracts entered into in the United Kingdom — in April, 1900, and December, 1901. One contract a year does not make a business. Lord Herschell in *Grainger* v. *Gough* (3) draws "a broad distinction between trading *with* a country and carrying on a trade *within* a country." Here there was no trade carried on within the United Kingdom, and the case is wholly different from *London Bank of Mexico* v. *Apthorpe* (4) and from *San Paulo Ry. Co.* v. *Carter.* (5)

Even if there is residence and business done in the United Kingdom the assessment is wrong. The tax was here imposed "in respect of the profits of the company in the United Kingdom and elsewhere." Under *Colquhoun* v. *Brooks* (6) the tax can only be levied on such portion of the income as is remitted to the United Kingdom.

[The question whether the company exercised their trade in this country within s. 2, Sched. D, of the Income Tax Act, 1853, was not fully argued.]

Sir J. Lawson Walton, A.-G., Sir R. B. Finlay, K.C., and *W. Finlay,* for the respondents, were not heard.

The House took time for consideration.

July 30. LORD LOREBURN L.C. My Lords, the question in this appeal is whether the De Beers Consolidated Mines, Limited, ought to be assessed to income tax on the footing that it is a company resident in the United Kingdom. Had the appellants prevailed upon that question, an ulterior point would have demanded consideration. Your Lordships, however, being satisfied upon the first point, dispensed with further argument.

Under the 2nd section of the Income Tax Act, 1853, Sched. D, any person residing in the United Kingdom must pay on his annual profits or gains arising or accruing to him

(1) (1881) 8 Q. B. D. 414.
(2) [1896] A. C. 325, 335, 340.
(3) Ibid. at p. 335.
(4) [1891] 2 Q. B. 378.
(5) [1896] A. C. 31.
(6) (1889) 14 App. Cas. 493.

H. L. (E.) 1906

DE BEERS CONSOLIDATED MINES, LIMITED v. HOWE.

Lord Loreburn L.C.

"from any kind of property whatever, whether situate in the United Kingdom or elsewhere," and also "from any profession, trade, employment, or vocation, whether the same shall be respectively carried on in the United Kingdom or elsewhere." Now, it is easy to ascertain where an individual resides, but when the inquiry relates to a company, which in a natural sense does not reside anywhere, some artificial test must be applied.

Mr. Cohen propounded a test which had the merits of simplicity and certitude. He maintained that a company resides where it is registered, and nowhere else. If that be so, the appellant company must succeed, for it is registered in South Africa.

I cannot adopt Mr. Cohen's contention. In applying the conception of residence to a company, we ought, I think, to proceed as nearly as we can upon the analogy of an individual. A company cannot eat or sleep, but it can keep house and do business. We ought, therefore, to see where it really keeps house and does business. An individual may be of foreign nationality, and yet reside in the United Kingdom. So may a company. Otherwise it might have its chief seat of management and its centre of trading in England under the protection of English law, and yet escape the appropriate taxation by the simple expedient of being registered abroad and distributing its dividends abroad. The decision of Kelly C.B. and Huddleston B. in the *Calcutta Jute Mills* v. *Nicholson* (1) and the *Cesena Sulphur Co.* v. *Nicholson* (1), now thirty years ago, involved the principle that a company resides for purposes of income tax where its real business is carried on. Those decisions have been acted upon ever since. I regard that as the true rule, and the real business is carried on where the central management and control actually abides.

It remains to be considered whether the present case falls within that rule. This is a pure question of fact to be determined, not according to the construction of this or that regulation or bye-law, but upon a scrutiny of the course of business and trading.

The case stated by the Commissioners gives an elaborate explanation of the way in which this company carried on its business. The head office is formally at Kimberley, and the

(1) (1876) 1 Ex. D. 428.

general meetings have always been held there. Also the profits have been made out of diamonds raised in South Africa and sold under annual contracts to a syndicate for delivery in South Africa upon terms of division of profits realised on resale between the company and the syndicate. And the annual contracts contain provisions for regulating the market in order to realise the best profits on resale. Further, some of the directors and life governors live in South Africa, and there are directors' meetings at Kimberley as well as in London. But it is clearly established that the majority of directors and life governors live in England, that the directors' meetings in London are the meetings where the real control is always exercised in practically all the important business of the company except the mining operations. London has always controlled the negotiation of the contracts with the diamond syndicates, has determined policy in the disposal of diamonds and other assets, the working and development of mines, the application of profits, and the appointment of directors. London has also always controlled matters that require to be determined by the majority of all the directors, which include all questions of expenditure except wages, materials, and such-like at the mines, and a limited sum which may be spent by the directors at Kimberley.

The Commissioners, after sifting the evidence, arrived at the two following conclusions, viz.:—(1.) That the trade or business of the appellant company constituted one trade or business, and was carried on and exercised by the appellant company within the United Kingdom at their London office. (2.) That the head and seat and directing power of the affairs of the appellant company were at the office in London, from whence the chief operations of the company, both in the United Kingdom and elsewhere, were, in fact controlled, managed, and directed.

These conclusions of fact cannot be impugned, and it follows that this company was resident within the United Kingdom for purposes of income-tax, and must be assessed on that footing. I think, therefore, that this appeal fails.

I will merely add that I agree with the Master of the Rolls that residence of a company within the meaning of the Income

H. L. (E.) 1906

DE BEERS CONSOLIDATED MINES, LIMITED v. HOWE.

Tax Acts is not necessarily the same thing as residence for the purpose of serving a writ.

LORD MACNAGHTEN. My Lords, I agree.

LORD JAMES OF HEREFORD. My Lords, I concur in the judgments that have been delivered, holding that the decision of the Court of Appeal should be affirmed.

It is true that the appellant company was registered in the colony, and it was contended that this registration constituted a foreign company which could not be resident within the United Kingdom. But I see no reason why this should be the case. Of course, a foreigner can reside here, and so can a foreign company.

Then upon the facts it seems clear that the business of diamond merchants was carried on by the De Beers Company in England. The principal office was here, the majority of directors met here, and although the diamonds sold came from Kimberley, the profits were realised within the United Kingdom. The company, therefore, resided and carried on business here, and necessarily the provisions of the Act of 1853 as to profits and gains arising or accruing to any persons resident within the United Kingdom, and as to profits and gains arising from any trade exercised within the United Kingdom, apply. The appeal must be dismissed.

LORD ROBERTSON. My Lords, I agree in the judgment of the Lord Chancellor.

LORD LOREBURN L.C. My Lords, I am requested by my noble and learned friend Lord Atkinson to say that he concurs in the opinion which I have now offered to your Lordships.

Order of the Court of Appeal affirmed, and appeal dismissed with costs.

Lords' Journal, July 30, 1906.

Solicitors: *Hollams, Son, Coward & Hawksley; Sir F. Gore, Solicitor of Inland Revenue.*

[HOUSE OF LORDS.]

SAMUEL AND ANOTHER . . . . . APPELLANTS; H. L. (E.) 1906

AND

NEWBOLD . . . . . RESPONDENT. *July* 17.

Money-lender—Borrower—Loan Transaction—Absence of Risk—Exorbitant Interest—"Harsh and Unconscionable"—Jurisdiction—Policy of Act—Relief—Money-lenders Act, 1900 (63 & 64 *Vict. c.* 51), *s.* 1.

The relief which the Money-lenders Act, 1900, extends to a borrower is not limited to cases in which before the Act the Court of Chancery would have given relief.

The policy of the Act is to enable the Court to prevent oppression, leaving it in the discretion of the Court to weigh each case upon its own merits and to look behind a class of contracts which peculiarly lend themselves to an abuse of power.

Decision of the Court of Appeal, *Saunders* v. *Newbold*, [1905] 1 Ch. 260, affirmed.

THE facts are stated in the judgment of Lord Loreburn L.C.

June 21, 22. *Upjohn K.C.*, and *Hohler*, for the appellants. The relief given by the Money-lenders Act, 1900, is limited to cases in which, before the Act, the Court of Chancery would have given relief: *Wilton* v. *Osborn* (1), per Ridley J. This view, though overruled by the Court of Appeal in *In re A Debtor* (2), is sound and reasonable. But, assuming that the view of the Court of Appeal is right in the present case, there is not enough to induce the Court to break the bargain made by the parties. There was no evidence that the interest charged in respect of the sum actually lent, and in the circumstances of the case, was excessive, or that the transaction was harsh and unconscionable. The conditions of relief under s. 1 of the Act are—(1.) that the interest charged on the actual advance is excessive; or (2.) that the preliminary and other expenses are excessive, and that in either case the transaction is "harsh and unconscionable, or is otherwise such that a Court of Equity would give relief." The conditions are not fulfilled here. When a man is under no pressure and is in a position to accept or refuse the

(1) [1901] 2 K. B. 110. (2) [1903] 1 K. B. 705.

H. L. (E.) 1906 SAMUEL v. NEWBOLD.

terms offered, terms which in other circumstances might be "harsh and unconscionable" lose that character. It is to be observed that the conjunction is "and," not "or unconscionable." The adjectives are really technical terms, and they are qualified, or rather explained, by what follows, "or is otherwise such that a Court of Equity would give relief." That implies that the law is not extended beyond the old Chancery jurisdiction. That jurisdiction was confined to the class of persons succinctly described as "expectant heirs." It is not now so restricted. Further, there has been a statutory creation of a new class of persons—money-lenders. These two elements constitute the whole scope of the Act. The Court of Appeal has enlarged its operation, and has practically expunged the words "is otherwise," which clearly shew that the grounds of relief are precisely what they were in the old Court of Chancery. In Courts of Equity the usurer was not affected in his quality of money-lender, but was deprived of the full benefit of his bargain under the doctrine of "constructive fraud." Mere harshness was no ground of relief. The contract must have been unconscionable, that is, unconscientious. The leading authority is that of Lord Hardwicke in *Earl of Chesterfield* v. *Janssen.* (1) That case is discussed, and the principles of equity expounded, by Lord Selborne in *Earl of Aylesford* v. *Morris.* (2) The leading elements were want of moral freedom and of the protection of guardians and friends. But Lord Selborne admits that "the arbitrary rule of equity as to sales of reversions was an impediment to fair and reasonable as well as to unconscionable bargains." The doctrine was developed by Denman J., in *Nevill* v. *Snelling* (3), to the case of a young man, the son of a rich father, who had only general expectations and no reversion. But apart from this limited class no relief was given. In *Bennet* v. *Bennet* (4), a case somewhat similar to this, Jessel M.R. said that the law does not prevent a man from being a fool if he likes, or even from agreeing to pay 100 per cent. The only ground of relief, he said, would have been fraud or insanity, to be set up in separate proceedings. Jessel M.R. there described

(1) (1750) 2 Ves. Sen. 125.
(2) (1873) 8 Ch. 484.
(3) (1880) 15 Ch. D. 679.
(4) (1876) 43 L. T. 246.

money-lenders as a "disreputable" class, paying themselves for the loss of character which they sustained. Kekewich J. regards them as respectable. The harshness of the terms is not sufficient to entitle to relief. In *Middleton* v. *Brown* (1), Jessel M.R. said that a "hard bargain," except as used for a term of abuse, must in equity be an unconscientious bargain. The interest, of course, might be so excessive as itself to constitute fraud. There is here no trace of fraud, legal or moral, or of overreaching; and no imputation has been cast on the appellants. The money-lender is between two fires. If the borrower is necessitous, sympathy is excited; if not, it is argued, a commercial rate of interest only ought to be exacted. It is true that a commission was paid to Sagar by each party, but Sagar was subpœnaed by the respondent and did not appear. The burden of proof was on the borrower or his executor.

Of cases under the Act *Wilton* v. *Osborn* (2) is in the appellants' favour; and Ridley J. held that a transaction to be reopened must be such that a Court of Equity would reopen it on the ground of its being "harsh and unconscionable." When that decision was disapproved by the Court of Appeal in *In re A Debtor* (3) Collins M.R. held that the words "harsh and unconscionable" are distinct from the words which follow. That is not the natural grammatical construction. In *Carringtons, Ld.*, v. *Smith* (4) it was held that the high amount of interest did not make the bargain "harsh and unconscionable." The circumstances were very similar to the present—the defendant was worth 1000*l.* a year, and had furniture and pictures of considerable value, and, like Mr. Alton here, understood the contract. But Channell J. held him to his bargain. In *Levene* v. *Greenwood* (5) the relief given was on the ground that the borrower misunderstood an obscure contract. *Poncione* v. *Higgins* (6) involved a claim for 300 per cent. interest, and the lender was also a highly paid agent for the plaintiff, to whom he owed a duty. In *Part* v. *Bond* (7), though security was given,

(1) (1878) 47 L. J. (Ch.) 411.
(2) [1901] 2 K. B. 110.
(3) [1903] 1 K. B. 705.
(4) [1906] 1 K. B. 79.
(5) (1904) 20 Times L. R. 389.
(6) (1904) 21 Times L. R. 11.
(7) (1905) 21 Times L. R. 553.

H. L. (E.) 1906 SAMUEL v. NEWBOLD.

the interest charged was 45 per cent. The Court held that any interest above 10 per cent. would have been excessive, and gave relief. These were specially hard cases, and very different from the present. It is the policy of the law to maintain freedom of contract, and not to interfere with the contracts of people who are on equal terms and not under duress or pressure.

P. O. Lawrence, K.C., and *M. M. Macnaghten*, for the respondents, were not heard.

The House took time for consideration.

July 17. LORD LOREBURN L.C. My Lords, in my opinion the judgment of the Court of Appeal ought to be affirmed. The plaintiffs Braham Samuel and Philip Samuel, trading as money-lenders under the name of P. Saunders, brought an action against James William Newbold, as the executor of one Alton, deceased, upon a promissory note for 3300*l.* made by the said Alton on October 3, 1903, in their favour. The defence, in substance, arose under the Money-lenders Act, 1900. Both Kekewich J. and the Court of Appeal held that the Act did apply, and that the plaintiffs were not entitled to more than the sum of 2000*l.*, the money actually advanced, with 10 per cent. interest.

This case is undoubtedly of importance, because the construction of the Act in question, which I understand has given rise to differences of opinion, comes up directly for the consideration of your Lordships.

The facts of the case are in substance as follows: Alton was, in the year 1903, a wealthy man. When he died in the following year his net estate was over 40,000*l.* There appears to be no doubt that, owing to intemperate habits, or, it may be, other disease, he was a person liable to be imposed upon, and singularly improvident in affairs of business. I will assume, however, that the plaintiffs were not aware of this. In the summer of 1903 one Sagar introduced Alton to the plaintiffs, and Alton borrowed from them on a promissory note the sum of 1000*l.* on terms of repaying them the 1000*l.* and 400*l.* more for interest by five monthly instalments of 250*l.* and the balance of 150*l.* on January 6, 1904, with a provision that in the event of

default being made in the payment of any instalment the whole amount then remaining unpaid should become payable forthwith. It is unnecessary to say more than that the rate of interest, in the circumstances, was exorbitant, and the transaction inexplicable in the case of a wealthy man, except upon the supposition that he was unfit to manage business. That first transaction, however, was ultimately settled, and for the moment I say no more of it.

In September of the same year the same intermediary, Sagar, was instrumental in procuring a fresh application by Alton to the plaintiffs for a fresh loan. This time the proposal was that Alton should borrow 2000*l.* upon the footing of repaying it, together with 1300*l.* for interest, by twelve monthly payments of 275*l.* each, and in the event of default in any one payment or part thereof, the whole amount remaining unpaid to become immediately due and payable. This transaction was completed by Alton giving to the plaintiffs a promissory note for 3300*l.* on those terms dated October 3, 1903. It was, like the preceding transaction, inexplicable except on the footing that Alton was unfit to manage business. The rate of interest was, we were told, 104 per cent. per annum if the instalments were punctually paid. In fact, owing to Alton's death, which occurred in November of 1903, default was made in one of the instalments, and, according to the terms of the loan, the whole sum of 3300*l.* became payable. Had it been paid, the plaintiffs would have received interest at the rate of 418 per cent. per annum or thereabouts.

There are two further circumstances in this case which require notice. One is that in September, 1903, the plaintiffs obtained a confidential report from an inquiry agency in regard to the financial position of Alton before advancing the 2000*l.* This report stated that Alton was regarded as a man of respectability, and was understood to be a large shareholder and director in the firm of A. & Co., Limited, brewers; that he was reputed to be well to do, but at times inclined to be slow with his payments. He was, however, the owner of property, and was considered a desirable man to deal with in the ordinary way of business. And, the report added, "it is not thought that any unreasonable

H. L. (E.) 1906

SAMUEL v. NEWBOLD.

Lord Loreburn L.C.

risk would be incurred in granting credit to the extent named." The other circumstance is that Sagar had been for years known to the plaintiffs and did business with them on terms of receiving commission from them. He received commission from the plaintiffs on the July transaction. He also received commission from the plaintiffs in regard to the October transaction, and he was a co-adventurer with the plaintiffs in lending the money to Alton to the extent of 500*l.* Sagar also received from Alton a commission for procuring him this loan of 2000*l.* in October. If it were necessary for the decision of this case, there is ample evidence that the plaintiffs were perfectly aware that Sagar was receiving a commission from Alton. And there is strong ground for believing that, notwithstanding Mr. Samuel's denial, Sagar was a co-partner with the plaintiffs from the commencement in the transaction of October 3, 1903. Apart from any question arising under the Money-lenders Act, your Lordships might well conclude that the plaintiffs were guilty of fraud which disentitles them to the benefit of their contract with Alton.

But this case has been decided on the Money-lenders Act, and argued on that basis before this House. Upon that basis also I consider that the plaintiffs' appeal fails. Under the Money-lenders Act, 1900, s. 1, sub-s. 1, a Court may re-open a transaction and take an account between the money-lender and the person sued upon two conditions. The first condition is that the interest charged in respect of the sum actually lent is excessive, or that the amounts charged for expenses, inquiries, fines, bonus, premium, renewals or any other charges, are excessive. There cannot be any doubt that the interest charged in this case is, under the circumstances, excessive. The second condition is that the contract is harsh and unconscionable, or is otherwise such that a Court of Equity would give relief. A serious question has arisen in this case as to the meaning and effect of these words. It has been contended that the Court cannot look at the simple point whether the transaction "is harsh and unconscionable," but that the language immediately following qualifies the meaning of those words. It is said that it is not enough if the transaction be harsh and unconscionable

unless it be so in the sense in which Courts of Equity are said to have applied that language in granting relief to expectant heirs and others in a like situation. According to this argument, the Act says no more than that persons borrowing from money-lenders shall have the same protection as expectant heirs formerly had, provided that the interest or charges are excessive.

In my opinion this contention cannot be maintained, nor ought a Court of Law to be alert in placing a restricted construction upon the language of a remedial Act. The section means exactly what it says, namely, that if there is evidence which satisfies the Court that the transaction is harsh and unconscionable, using those words in a plain and not in any way technical sense, the Court may re-open it, provided, of course, that the case meets the other condition required. A transaction may fall within this description in many ways. It may do so because of the borrower's extreme necessity and helplessness, or because of the relation in which he stands to the lender, or because of his situation in other ways. These are only illustrations, and, as in the case of fraud, it is neither practicable nor expedient to attempt any exhaustive definition. What the Court has to do in such circumstances is, if satisfied that the interest or charges are excessive, to see whether in truth and fact and according to its sense of justice the transaction was harsh and unconscionable. We are asked to say that an excessive rate of interest could not be of itself evidence that it was so. I do not accept that view. Excess of interest or charges may of itself be such evidence, and particularly if it be unexplained. If no justification be established, the presumption hardens into a certainty. It seems to me that the policy of this Act was to enable the Court to prevent oppression, leaving it in the discretion of the Court to weigh each case upon its own merits and to look behind a class of contracts which peculiarly lend themselves to an abuse of power.

I also agree with the Court of Appeal that the order is to be without prejudice to the right of the defendant as executor of Alton, deceased, to bring any action in respect of the transaction of July, 1903.

H. L. (E.) 1906 SAMUEL v. NEWBOLD.

LORD MACNAGHTEN. My Lords, I agree; I think this is a very idle appeal. I do not think that there is any difficulty as regards the facts or the law. It seems to me that the construction of the Money-lenders Act, 1900, is plain enough, and that the evidence before your Lordships is more than sufficient to shew that this case is within the mischief which the Act was designed to remedy.

Before considering the precise terms of the Act I would venture to make one or two observations. The first thing, I think, which must strike anyone on reading the Act is that the jurisdiction created or conferred by it is not committed exclusively to the Division of the High Court already conversant with somewhat analogous questions. Any branch of the High Court, any county court, any Court in the kingdom, to which the money-lender may resort for the purpose of enforcing his extreme rights is armed with power to protect the money-lender's victim. The next observation I would make is that, although the Court of Chancery from the earliest times was familiar with questions more or less analogous, it never assumed to deal with them on the principle on which this Act grants relief. In certain cases which, in modern times at any rate, have been confined to dealings with expectant heirs, including the whole class of persons for convenience' sake comprehended under that designation, the Court of Chancery gave relief on terms. On the plaintiff submitting to do equity by repaying what was justly due, the Court set aside the transaction which it considered unrighteous, and ordered that the securities impeached should stand as a security for the money actually advanced with interest. But the Court never remodelled the bargain. "The Chancery"—as a great judge said many years ago—"mends no man's bargains." (1) So the Act involves a new departure in principle, and the working of the machinery is entrusted to hands rougher it may be, but not less ready, and not, I think, less competent for the purpose which the Legislature had in view; and yet it is argued that there is an atmosphere of Chancery about the Act from which there is no escape!

The question which it is said this appeal was brought to

(1) Lord Nottingham in *Maynard* v. *Moseley* (1676) 3 Sw. 655.

determine is whether the view of Ridley J. or the view of the Court of Appeal was right. Ridley J., with whom Channell J. seems to have agreed, thought that the relief which the Act extends to a borrower must be limited to those cases in which, before the Act, the Court of Chancery would have given relief, and that the only standard to be applied under s. 1 is that adopted by the Courts of Equity before the Act. Speaking for myself, I must say that, while listening with great interest to the exhaustive exposition addressed to the House by the learned counsel for the appellants, I could not help thinking what a mockery it would be if that were all that the Act has done; what an intolerable strain would be thrown upon inferior Courts, unfamiliar with the doctrines and the practice of Courts of Equity, if they were privileged or condemned to listen to lengthy arguments and venerable precedents before deciding a question that any man of common sense is just as capable of deciding as the most learned judge in the land, provided he is not hampered by authorities, which require no little training to discriminate and appreciate at their true value.

But does the Act require anything of this sort? It says that if there is evidence which satisfies the Court that the interest charged in respect of the sum actually lent is excessive, and that the transaction is harsh and unconscionable *or is* otherwise such that a Court of Equity would give relief, the Court may re-open the transaction and relieve the person sued from payment of any sum in excess of the sum adjudged by the Court to be fairly due in respect of principal and interest as the Court, having regard to the risk and all the circumstances, may adjudge to be reasonable.

It seems to me there are two cases contemplated by the Act: one where the interest is excessive and the transaction harsh and unconscionable, the other where the interest is excessive and the transaction is such that, without the necessity of proving the transaction to be harsh and unconscionable—without going into that question at all—a Court of Equity would give relief. It seems to me that those two cases are meant to be distinct. I think that is the grammatical construction of the language used. I think it is shewn by the introduction of the word "is" in

H. L. (E.) 1906 SAMUEL v. NEWBOLD. Lord Macnaghten.

the second line of the sentence; and I think the circumstance that the second alternative is excluded in the application of the Act to Scotland points in the same direction. It would be, of course, inapplicable to the Scottish system of jurisprudence, but in the application of the Act to Scotland nothing is introduced in its place, and the case under the first limb of the sentence is complete without anything more.

In dealing with the first alternative the Court must be satisfied that the transaction is "harsh and unconscionable," that is, as I think the latter part of the section shews, unreasonable, and not in accordance with the ordinary rules of fair dealing. The rate of interest may be so monstrous as to shew that by itself. There may be, as Lord Thurlow said in one case, "an inequality so strong, gross, and manifest that it must be impossible to state it to a man of common sense without producing an exclamation at the inequality of it": *Gwynne* v. *Heaton*. (1) That, I think, is the case here. But I think the present case also falls under the second alternative. Undoubtedly there were surreptitious dealings between the money-lender and Sagar, quite enough of themselves to avoid the transaction according to the principles of a Court of Equity. The money-lender admits that he paid the borrower's agent a commission for introducing the business to him—that is, in plain words, for leading or luring the victim into his toils.

One word as to the facts. On October 3, 1903, at the invitation of Mr. Sagar, whom he had "known for years," and to whom he was about to pay a handsome commission for his intervention besides giving him a share in the profits of the enterprise, the money-lender goes to Mr. Sagar's office, and there he finds Mr. Alton sitting, and, as he admits, not without traces of past intemperance on his countenance. He knew that Mr. Alton was perfectly solvent, and that there was not the slightest risk in the transaction. He gives Mr. Alton a cheque for 2000*l.* and takes a bill for 3300*l.* Mr. Alton, he tells us, said "'All right,' and signed the bill." The money-lender says, "That is all that passed, and I gave him the cheque and wished him good-morning." It is no wonder that Mr. Sagar was not called to

(1) (1778) 1 Bro. C. C. 9.

explain the transaction. But the transaction is absolutely inexplicable if Mr. Alton is to be credited with any sense or any vestige of business capacity. Even assuming that Mr. Alton was in some distress, it must be remembered, as Sir William Grant said: "It is not every bargain which distress may induce one man to offer that another is at liberty to accept": *Bowes* v. *Heaps*. (1)

I agree that the appeal must be dismissed with costs.

LORD JAMES OF HEREFORD. My Lords, I feel that, apart from a decision upon the particular case before your Lordships, it is very desirable that a judgment upon the construction of the Money-lenders Act should be clearly and distinctly expressed.

I am glad that the Court of Appeal has declared that the construction put upon the Act by the judges of the King's Bench Division was incorrect. The views expressed by those judges went far to render the Act nugatory, and it is important that all doubt upon the subject should be removed.

Now the objects of the Act can easily be traced from its contents. The ends sought to be remedied by it were generally recognized. A class of men well known under the term "money-lenders" were, under different names and disguises, carrying on the business of lending money.

No usury laws remained to restrain them, and so in many instances they lent money at as high a rate of interest as could be wrung from the necessities of the borrower. Terms were imposed which caused default, however technical, to add to the burthen to be borne by the debtor.

No sufficient legal remedy existed. The old Chancery jurisdiction was too narrow to meet the case. It was not with remaindermen and reversioners that the modern money-lender dealt. The needy, helpless, perhaps unwary, borrower was of a different class to those who had in former days applied to the Court of Chancery for relief. It was principally in the county courts the money-lender sought to enforce his contract, and those courts had no power to grant direct relief against oppressive contracts. True it was that humane judges would sometimes mark their

(1) (1814) 3 V. & B. 117, 119.

H. L. (E.) 1906 SAMUEL v. NEWBOLD. Lord James.

sense of the unsatisfactory state of the law by minimizing the payments to be made to such an extent that many judgments given in accordance with the existing law became nugatory in their effect.

To remedy such evils by affording sufficient legal protection against them the Legislature was moved to action. It certainly did not intend to leave the old law as it was. The intention certainly was to give the debtor greater legal protection against the money-lender than then existed. This appears from the statute itself. The title and the provisions of the Act all shew that the Act is an amending Act, and that Vaughan Williams L.J. was correct when he spoke of it as an "amplifying" Act.

The basis of the jurisdiction of the Court when granting relief is "that the interest charged in respect of the sum actually lent is excessive"; . . . . then also the transaction must be harsh and unconscionable, or otherwise such that a Court of Equity would grant relief. On these grounds the transaction may be re-opened, and the relief given by the statute is important to be noted: "the Court . . . . may relieve the person sued from payment of any sum in excess of the sum adjudged by the Court to be fairly due in respect of such principal, interest and charges, as the Court, having regard to the risk and all the circumstances, may adjudge to be reasonable."

Now, two learned judges, Ridley J. and Channell J., held that a contract to pay interest, however high and excessive, could not be re-opened unless it was for other reasons "harsh and unconscionable" within the old practice of Courts of Equity, which, apart from fraud, granted relief only when contracts affecting estates in remainder had been made. Such, too, was the argument at your Lordships' Bar. But the learned counsel for the appellants had to admit, as I understood him, that his argument went beyond the express words of the section, and he recognized that, in order to support his reading, some words had to be inserted and some struck out. This argument and the judgments I have referred to appear to me to be erroneous.

But I am relieved from a further minute dissection of the terms of the section, because I desire to adopt to the fullest extent the judgment delivered by the Court of Appeal in the

case of *In re A Debtor*. (1) That judgment distinctly overruled the view expressed by Ridley J. in the case of *Wilton* v. *Osborn* (2), to the effect that the only standard of relief to be applied under s. 1 of the Act was that which was adopted by the Courts of Equity before the passing of the Act. But the Court of Appeal expressly dissented from such a limited construction of the effect of the Act. The Master of the Rolls said: "Ridley J. has held that the words of s. 1 must be taken to have limited the relief to be given to a borrower to that relief which a Court of Equity would have given before the Act. I cannot agree with that construction. In my opinion the relief which may be given under the Act cannot thus be limited. I think the words 'harsh and unconscionable' are distinct from and independent of the words which follow. Relief may be given if the bargain is harsh and unconscionable by reason of excessive interest or other excessive charges."

In the same case Romer L.J. said: "In my judgment the words 'harsh and unconscionable' stand by themselves." And Cozens-Hardy L.J. said: "I should be sorry to lay down any rule which would fetter the discretion of the Court of Equity. . . . . I should be sorry to say that the rate of interest charged and the other charges might not be so excessive as to render the transaction 'harsh and unconscionable.'"

As the Court of Appeal has in the present case acted on and accepted this view, the weight of authority is overwhelming in favour of construing the Act without introducing into it arbitrary limitations, and this construction, I submit to your Lordships, is correct.

The result I have arrived at may therefore be summarized as follows: Excessive interest of itself is sufficient to render a contract harsh and unconscionable. Proof of excessive interest may of itself, therefore, be sufficient to entitle the debtor to relief. What amounts to excessive interest is to be determined by the tribunal in each case, the question of risk being a material matter for consideration. When excessive interest is apparently established, any facts that tend to shew that such

(1) [1903] 1 K. B. 705. (2) [1901] 2 K. B. 110.

H. L. (E.) 1906 SAMUEL v. NEWBOLD. Lord James.

excess does not render the contract "harsh and unconscionable" should be proved in evidence by the lender. This burthen is on him. Such appearing to me to be the construction that should be put upon the Money-lenders Act, and applying it so construed to the facts of the present case, I entertain no doubt of the correctness of the judgments delivered by Kekewich J. and by the Court of Appeal.

I purpose dealing only with the advance made on October 3, 1903. That advance was of the sum of 2000*l.* made by the appellants to one Alton, now deceased. In return the debtor gave a promissory note for 3300*l.* Payment of it was to be made by twelve monthly instalments of 275*l.* each, commencing on November 3. In case of default on any of the payments the whole sum remaining unpaid was to become immediately due. The first instalment was paid, but the debtor died on November 18, 1903, and defaults occurred in relation to the payments contracted for. If no default had been made the interest charged was at the rate of 104 per cent. per annum. But in consequence of the defaults the interest now sought to be recovered amounts to 400 per cent. The principal sum advanced, 2000*l.* and interest at the rate of 10 per cent., has been paid to the plaintiffs and accepted by them on account.

There is a great deficiency in the evidence affecting the contracting of the loan. The borrower was a man of good means, and no necessities drove him to contract a loan at an excessive rate of interest. The lenders made inquiries as to Alton's means and reputation through Stubbs' Agency. The report made stated: "Alton is regarded as a man of the highest respectability, and is understood to be a large shareholder and director in the firm of A. & Co., brewers of this town. He is reported to be well to do, but at times is inclined to be slow in his payments. He is, however, the owner of property, and is considered a desirable man to deal with. In the ordinary way of business it is not thought that any unreasonable risk would be incurred in granting credit to the extent named, 2000*l.*"

The principal part in arranging for the loan was effected by one Sagar. He received a commission from Alton for effecting the loan, also a commission from the plaintiffs for the like

service, and on October 3 or 5 he became a co-adventurer with the plaintiffs in the loan to the extent of 825*l.*

The mystery that apparently affected Alton's conduct in borrowing money at an excessive rate of interest whilst possessing a large balance and being on good credit with his bankers might possibly have been explained, but no explanation was given. Everything could probably have been cleared up by Sagar. He had previously acted for the plaintiffs in arranging loans, and was well known to them, and, as I have said, he became a co-adventurer with them in the transaction. Sagar was present in Court during the hearing before Kekewich J., but was not called to explain, as he apparently could have explained, this mysterious transaction.

But apart from all explanation certain facts are established. The borrower was a man of good credit and means. His balance at his bankers' was considerable. When he died the net value of his estate was upwards of 40,000*l.* This good reputation and position were known to the plaintiffs—certainly through Stubbs, probably through Sagar. In lending to such a man the plaintiffs knew that they ran but little, perhaps no, risk, and yet they demanded and obtained 100 per cent. interest. It is true that the borrower was stated to be slow in his payments. To the plaintiffs this must have been a characteristic of high worth, for if happily acted on the rate of interest would spring from 100 to 400 per cent.

The Court of Appeal have held that there was no appreciable risk in the lending of this money, "and that the money-lenders were fully aware of the absence of risk." It seems scarcely possible to contest this finding upon the evidence before the Court. But if the plaintiffs desired that different conclusions should be arrived at it was for them to give evidence that should account for the excessive interest charged. Nothing was done in this direction. The Court of Appeal further held that the rate of interest was excessive, having regard to the risk, or absence of risk, and that the terms, having regard to what the money-lenders knew of Alton, were harsh and unconscionable.

With this finding I entirely agree. The word "excessive" applied to interest is, of course, a relative and elastic term,

H. L. (E.) 1906 SAMUEL v. NEWBOLD. Lord James.

impossible of absolute definition. But we know the general rate of interest in commercial transactions, and in loans on perfect security. We know the rate of interest juries are in the habit of giving in cases of adjudging damages. But in respect of ordinary loans deviation from these guides, dependent upon the facts of each case, must doubtless be expected and ought to be allowed. But such deviation must be reasonable in relation to facts. In the present instance the minimum return of 100 per cent. is, in relation to the risk run, clearly excessive. Kekewich J. and the Court of Appeal have so held, and in their judgment I concur.

Only one step remains. This unexplained excessive interest of itself makes the contract harsh and unconscionable; and the case thereby is, in my judgment, clearly brought within the provisions of the Money-lenders Act. I submit that the appeal must be dismissed.

LORD ROBERTSON. I agree with your Lordships.

LORD ATKINSON. My Lords, I concur with my noble and learned friends who have preceded me, and I think it unnecessary to deal with the part of the case with which they have dealt. The Money-lenders Act of 1900 in my opinion confers upon the Courts of this country a new jurisdiction, and gives to borrowers a form of relief different in kind and range from that theretofore granted to any class of tribunal in this country. The relief given is, as my noble and learned friend Lord Macnaghten has pointed out, not that theretofore administered by Courts of Equity, but differs from it in character, nature and extent. The relief being thus different, it would appear prima facie to be an unsound mode of construction of the statute which would confine the grounds for giving that enlarged relief to those heretofore recognized as sufficient in Courts of Equity, and, in addition, merely alter the law to the extent of widening the limited class who have hitherto been able to seek relief in Chancery so as to make that class include all borrowers.

I concur with the Court of Appeal that the words "harsh and unconscionable" are not qualified by those words which immediately follow, namely, "such that a Court of Equity would give relief." The statute did more, I think, than extend and widen the

character and nature of the relief which might hitherto have been granted, or increase the number of possible plaintiffs for equitable relief. It also extended the grounds on which this enlarged relief might be given.

I am quite unable to accede to the argument so much pressed upon your Lordships that interest however excessive cannot amount to prima facie evidence that advantage was taken, or a market made, of the borrower's necessity or weakness, or that an unconscionable use was made of the power over him which the lender was in a position to exercise so as to entitle the borrower to relief under the statute, or that the transaction was not reasonably consistent with any course of fair dealing.

It will, of course, be always competent for the lender to shew that, despite the excessive rate of interest, the transaction was in fact fair and reasonable; but to permit a lender to succeed in retaining the benefit of a bargain securing to him gains apparently so inordinate as those attempted to be secured by the lender in this case, without giving satisfactory proof of the character I have mentioned, would, in my opinion, altogether defeat the object of this remedial legislation. In the present case the transaction seems to me, on the evidence, altogether inexplicable on any system of fair dealing. The borrower was solvent, and known to be solvent. The risk was trifling, the rate of interest extravagant, the clause of forfeiture quite unnecessary for the protection of the lender, and extortionate in its character. The associate of and co-operator with the lender, who negotiated the business, practically made the contract, received commission from both sides and shared the spoils, was, though present in Court, not examined. Nor was any evidence given to shew how the borrower, assuming he was sane, ever came to submit to terms so onerous as those imposed upon him. In my view, therefore, the transaction prima facie came within the terms of the statute and the mischief that it was designed to remedy; and I concur that the appeal should be dismissed with costs.

Order of the Court of Appeal affirmed, and appeal dismissed with costs.

Lords' Journals, July 17, 1906.

Solicitors: *B. Barnett; Fowler & Co., for Eddowes & Sons Derby.*

[HOUSE OF LORDS.]

H. L. (Sc.) 1906 *July* 16.

ALEX. PIRIE & SONS, LIMITED . . . . Appellants;

AND

EARL OF KINTORE AND OTHERS . . . . . Respondents.

(ET È CONTRA)

Salmon Fishing—Impeding Passage of Fish by Abstraction of Water.

Interference with the free passage of salmon up a river is a wrong against the proprietors of the upper fisheries, and if it materially obstructs the passage of fish can be restrained by interdict.

In 1882 mill owners on the Don river, which is a salmon river, increased their diversion of the water from its natural channel into artificial channels serving the uses of their mill. This was done to such an extent as to leave the natural channel in the neighbourhood of the mill at times bare of water. In 1900 the proprietors of the salmon fisheries in the upper reaches of the river objected to the mill owners' diversion of the water, and asked for an interdict:—

Held (affirming the decision of the First Division of the Court of Session), that they were entitled to an interdict.

Appeal from the First Division of the Court of Session, Scotland. (1)

This was an action for declarator and interdict raised by the Earl of Kintore and others, the respondents, proprietors of salmon fishings in the river Don, against Messrs. Pirie & Sons, the appellants, who were paper makers and proprietors of Stoneywood Works, Waterton, on the south bank of the river Don near Bucksburn, Aberdeen, five miles from the estuary, and at a point a long way lower down the river than the respondents' fishings. The complaint of the respondents was that the appellants' operations in connection with their intake of water for working their mill had dried the river Don at some portions of its course, and thus prevented or impeded the progress of salmon up river to the respondents' fishings. The respondents asked, first, to have it declared that certain alterations carried out by the appellants upon their dam dykes, sluices, and lades in 1882 had had the effect of obstructing the passage of salmon;

(1) (1904) 5 F. 818.

secondly, that the appellants be ordered to restore their water intakes and dams to the position before 1882; and, thirdly, that the appellants' intake of water for power purposes should be limited to such a quantity as may have been so drawn off for the prescriptive period.

The fisheries belonging to the Earl of Kintore and the other proprietors who had joined in raising this action were all situated on the upper reaches of the river at a considerable distance above Messrs. Pirie's works. The action was raised by the respondents in their capacity of owners of salmon fishing only, not as riparian proprietors. By the law of Scotland the right of salmon fishings is a separate feudal tenement, independent of property in either bank, although it generally happens that the riparian proprietor is also the owner of the salmon fishings ex adverso of his property. But in this case no right or interest of the respondents in the river qua riparian proprietors was alleged to be interfered with, and none such were in controversy; nor was it alleged that any interference was made with the waters where the respective fisheries were situated. The sea fisheries are all miles from the neighbourhood of Messrs. Pirie's works, and are unaffected by them. What was alleged by the respondents was that Messrs. Pirie's waterworks, by obstructing the passage of migratory fish, were prejudicial to the general interests of salmon fishing in the river as a whole, and therefore justified a complaint at the instance of each and all of the owners of salmon fisheries on the river.

The evidence proved that previous to 1882 the appellants had a prescriptive right to take 7000 cubic feet of water per minute, and that the principal abstraction of water from the river was at that period by means of an intake called the Waterton Dyke, the water, after being used for power purposes, being passed back into the river about 666 yards below the Waterton Dyke, and water abstracted at the Stoneywood Dyke was returned to the river about 640 yards below that dyke and above the Waterton Dyke, but the result of the appellants' operations in the Stoneywood Dyke between 1879 and 1882 was that a very much larger quantity of water was withdrawn and kept out of the channel of the river for a distance of 1300 yards. The

H. L. (Sc.) 1906

ALEX. PIRIE & SONS, LIMITED v. KINTORE (EARL).

respondents' complaint was therefore against the increased withdrawal of water and the keeping the water out of the channel for so much greater a distance, it being of the greatest importance to the existence of the upper fishings that the fish should have a free run from the sea.

The Lord Ordinary pronounced several interlocutors which are dealt with in the opinion of Lord Robertson. It is sufficient to state here that the Lord Ordinary found that damage had been done to the respondents' fishings, and, after receiving the report of two men of skill, he granted an interdict. The First Division also held that the fish had been obstructed (1), and affirmed the Lord Ordinary's judgment.

May 17, 18, 22, 25. *James Avon Clyde, K.C.*, and *W. J. Cullen, K.C.* (with them *E. B. Nicolson*) (all of the Scottish Bar), for the appellants. This is a controversy, not between rival owners of fishings, but between owners of fishings and mill owners. The upper owners of the fisheries objected to the lower proprietors legitimately using the water of the river; and the only question is, Has there been an invasion of the fishery rights possessed by the respondents? The respondents contend that fish have a natural road up this river, and that the least change in the state of the river is an illegal alteration, so that an owner of fishings which may be fifty miles away from the property of the mill owner might raise an action against the latter for taking more water than his prescriptive right gave him: see *Menzies* v. *Macdonald* (2); *Menzies* v. *Wentworth*. (3)

The respondents' summons charges the appellants with illegal acts, and it is urged that they have no right or title to impede the free passage of salmon—in fact, that they have no right to take water at all if they impede the passage of the fish. The respondents treat the question as if it arose between opposite riparian owners, where one has a right of veto against the other doing anything to alter the condition of the alveus. The respondents' argument would extend the right of veto in this case to the owners of fishings miles away, so as to deprive the appellants of

(1) 5 F. 818.

(2) (1854) 16 D. 827; (1856) 2 Macq. 463.

(3) (1901) 3 F. 941.

their riparian rights except as protected by prescription. The old statutes dealing with salmon fishings shew that regulation between competing rights in the water was the mode in which disputes were settled in ancient days. The earliest Act was an Act of 1175, to be found in *Lord Leconfield* v. *Lord Lonsdale* (1), and the other important Acts were those of 1696, c. 33, 1424, c. 12, and 1828, 1862, 1868; and see Lord Westbury in *Hay* v. *The Magistrates of Perth*. (2) A pass for salmon was made by the Don Fishery Board, but everybody agreed it was most unsatisfactory, and the appellants cannot be held responsible for that. It may be conceded that a lower proprietor has a right to complain if his water is carried away, altered in quality, or the flow impeded—in fact, if the natural state of the water is interfered with. But the same law does not apply to an upper fishery proprietor whose water ex adverso his land is not interfered with. For eighteen years the respondents have acquiesced in the appellants' mode of taking the water; and after so long a lapse of time the respondents ought not to be allowed to interfere. Then there was an agreement with the opposite riparian owner which in effect placed the appellants in the position of owners of both banks, and gave them power to divert much more water than their own prescriptive right. The remit to the Lord Ordinary ought to have been as to what quantity of water could be taken without causing injury to the fisheries.

[They commented on *Baillie* v. *Lady Saltoun* (3); *West* v. *Aberdeen Harbour Commissioners* (4); *Duke of Sutherland* v. *Ross* (5); *Lord Forbes and Others* v. *Leys, Masson & Co.* (6); *Robertson* v. *Foote & Co.* (7); *Hunter and Aikenhead* v. *Aitken* (8); *Orr Ewing* v. *Colquhoun's Trustees*. (9)]

W. Campbell, D.F. (with him *Lord Kinross*), for the respondents. The appellants were doing away with the whole of the water of this portion of the river and impeding the progress of

(1) (1870) L. R. 5 C. P. 657, 673.
(2) (1863) 4 Macq. 535, 542.
(3) (1821) 1 S. (1st ed.), p. 227; (2nd ed.), p. 216.
(4) (1876) 4 R. 207.
(5) (1877) 4 R. 765; (1878) 3 App. Cas. 736.
(6) (1831) 5 W. & S. 384.
(7) (1879) 6 R. 1290.
(8) (1880) 7 R. 510.
(9) (1877) 2 App. Cas. 839.

H. L. (Sc.) 1906

ALEX. PIRIE & SONS, LIMITED v. KINTORE (EARL).

the salmon. The question was whether that was legal. Our right is to have the river preserved in its natural state, not merely as a roadway for fish, but where fish can live.

[He was stopped and asked to confine his argument to the terms of the interdict the respondents desired, in the view that the present interdict of the Lord Ordinary could not stand.]

James Avon Clyde, K.C., in reply.

The House took time for consideration.

LORD LOREBURN L.C. My Lords, I have had the advantage of reading in print the opinion of my noble and learned friend Lord Robertson, and I so fully concur in it that it will not be necessary for me to enter upon the merits of this appeal.

I desire to add that my only difficulty in this case has been in regard to the terms in which the decree should be framed. In England the ordinary course is to grant an injunction in general terms prohibiting any invasion of the rights declared by the Court. It works well in practice, and leaves those against whom the injunction is directed as much freedom as is compatible with a due observance of the rights of their adversary. In the course of the argument a suggestion was made to the counsel on both sides that this course might with advantage be adopted in the exceptional circumstances of the present case. On both sides, however, counsel were disinclined to accept this course, and alleged that it is the custom in Scotland to prescribe in the decree with particularity both what is permitted and what is prohibited. I do not presume to question the wisdom of the course they prefer or the propriety of the rule usually followed in Scotland, but in those circumstances I feel that no alteration of the decree appealed from is possible beyond that suggested by my noble and learned friend Lord Robertson.

LORD DAVEY. My Lords, I think that both parties to this appeal have put their case too high. The appellants contended that the respondents had no right to any interdict, and that their only remedy was an order, either from the Court or from the fishery board, for a new salmon ladder. Of what use this would be to the respondents in a case like the present, where the

appellants for six days in the week leave the bed of the river dry but for a few disconnected pools, I do not know. I am of opinion that it is established by the cases which were referred to that to interfere with the free passage of the salmon up the river is a wrong against the proprietors of the upper fisheries for which interdict is the appropriate remedy. But what should be the nature and extent of the interdict? The respondents say their right is to have the river maintained in its natural condition, and any interference, however slight, to the natural flow of the stream is therefore a wrong which may be restrained by interdict. I think this puts the right of the fishery owners against the lower riparian proprietors too high, and that their right is only to require that no interference shall be made which materially obstructs the passage of the fish.

Having said this much, I can find nothing else in this case, which has been placed before your Lordships with such copiousness of material and such a wealth of illustration. There is no other question of law, and there is no question of fact in dispute, and the only real question is as to the form of the interlocutor. In substance I agree with my noble and learned friend Lord Robertson. The interdict and mandatory part of the order are in a form which is not common in England, but is preferred by Scottish lawyers. It is, however, said that the order is inelastic, and a change of circumstances may arise to which it is not adapted. In order to meet this objection my noble and learned friend Lord Robertson proposes to add some words which, I think, will have the desired effect. But in substance your Lordships confirm the interlocutor, and I think that the amendment should not affect the costs of the appeal, which should be paid by the appellants, and the cross appeal should also be dismissed with costs.

LORD ROBERTSON. My Lords, the record in this case is extremely voluminous, and your Lordships heard a very long and anxious argument for the appellants. In the result, however, the question before the House lies in comparatively narrow compass.

The Don is a salmon river, and the respondents own salmon

H. L. (Sc.) 1906

ALEX. PIRIE & SONS, LIMITED v. KINTORE (EARL).

Lord Robertson.

fishings in some of its upper reaches. They have therefore clear right to insist that the appellants, who are lower proprietors of lands on the banks of the river, shall not obstruct the free passage of salmon up the river. The present action, although the summons contains a great many conclusions, is strictly confined to the enforcement of this one right, the right to secure the free passage of the salmon against artificial obstruction or denudation of the channel.

What the appellants have done is to divert the water of the Don from its natural channel into artificial channels serving the uses of their paper mills. This has been done to such an extent as to leave the natural channel opposite the mills at times bare of water, and therefore necessarily impossible of passage to salmon.

It is superfluous to add that the artificial channels do not furnish a safe passage for salmon.

What, then, are the rights of the appellants which can be opposed to those of the respondents? They come from two sources. First of all, as riparian proprietors having right (for this I shall assume) to both banks in this part, they are entitled within their own boundaries to divert the water of the river. The condition of this right is that the water must be returned, and this condition is merely one of the consequences of the general principle that the water of a running stream can only be dealt with by anyone so far forth as is consistent with the rights of the other proprietors interested in it.

Secondly, the appellants have by prescriptive use acquired right to abstract from the river, for a certain part of its course, a quantity of water stated at 7000 cubic feet per minute.

The operations complained of, however, cannot possibly be justified by this prescriptive use, for the abstraction of 7000 cubic feet per minute was for practical purposes harmless to the salmon; and this second of the appellants' rights is therefore immaterial to the controversy. The appellants have, indeed, attempted to piece on to their prescriptive use of the water in question, which was 7000 cubic feet, the use had of the river for another part of its course by themselves or by persons whose rights they have acquired. I do not think that this argument requires any elaborate refutation. The effect of forty years' use of

water of a river is to give the person so using right to continue that use modo et forma at the place where the use has taken place. It is not to give him a general right to encroach on the common subject, viz., the river, to the gross amount of his prescriptive abstraction.

Accordingly, the true position of the appellants must be found in harmonizing their right to abstract water, such as it is, derived from the two sources specified, with the respondents' right to the free passage of the salmon. Prima facie, on the facts found and not now disputed, the appellants are wrong-doers; they have exceeded their rights to the injury of the respondents. The logical result would be a general interdict against encroachment. In the practice of the Scottish Courts, however, it has been usual to avoid the controversies which might arise as to the effect of general interdicts by proceeding to practically harmonize the contending rights by prescribing remedial works or restrictions on use. This is what the Court of Session has done in the present instance. Such procedure generally, and what has been done here in particular, is subject to the criticism that the decree which ultimately is pronounced is apt to appear as rigid as the general interdict appears to be vague. Subject, however, to one safeguard, which I am to suggest, I think the Court have well performed this difficult administrative work.

I am bound to add that in the performance of this task the Court did not receive due assistance from the appellants, and if, in the sequel, they should suffer from the rigidity of the system established, they may impute it to themselves. When the appellants were found to be wrong-doers (and that they were exceeding their rights to the respondents' injury was manifest all along), their proper attitude was that of deprecating interdict, which was the strict legal consequence, and pointing out to the Court means which would in future safeguard the interests which they had injured. The initiative in this stage strictly speaking lay with them, to be allowed to propose remedial measures. This was not the course taken by the appellants; they have acted as critics of the action of the Court, and of the practical recommendations of the Court's skilled advisers. Now I am not disposed too readily to accept such criticism.

H. L. (Sc.)
1906
ALEX. PIRIE & SONS, LIMITED v. KINTORE (EARL).
Lord Robertson.

Lord Kyllachy, in my opinion, accurately stated the conditions on which the Court entered on this inquiry about remedial works when, in his interlocutor of March 20, 1903, he laid it down that "when the defenders' (appellants') operations at Stoneywood do by themselves or in conjunction with similar operations or other causes affect the flow of the river between the point of abstraction and the point of return so as to impede the free passage of salmon between the said points, the defenders are limited, both with respect to the amount of abstraction and the point of return, to the usage existing prior to 1882, and are only entitled to innovate upon that usage when and so long as the river flows and continues to flow over Stoneywood Dyke and thence downwards to the actual point or return, in such volume as to ensure the free passage of salmon between the point of abstraction and the point of return." I think also that the men of skill were properly directed to report—"(1.) what depth or volume of water, measured by inches or otherwise, would be, in their opinion, sufficient to secure the free passage of salmon in said part of the river; and (2.) whether any, and if so what, arrangements are possible which would automatically or otherwise ensure the observance by the defenders of the limitations attaching, as above expressed, to their right to abstract water from the river at Stoneywood Dyke."

Now, my Lords, it is not my intention to examine minutely the report of the men of skill or the final order of the Court. That order prohibits the abstraction of more than the prescriptive quantity, 7000 cubic feet per minute, except when nine inches of water are flowing over the crest of the upper dyke and thence to the Green Burn, and lays it down that, even on these excepted occasions, they are not to withdraw a larger quantity than 31,850 cubic feet per minute, except when and so long as there shall be left to flow over the said dyke to the Green Burn at least one half of the whole water flowing down the river at the time. There follow detailed conditions about the return of the water, and about gauges and marks. All this is enforced by interdict against abstracting more than the prescriptive quantity, except on the occasions and under the conditions specified, and against deviating from the prescribed place and conditions of return of the water.

Now, having carefully considered this scheme, I think that it is as well adapted to the difficult problem to be solved as any that could be constructed; and, as I have said, it rests on sound principles. The learned judges who considered it have had much and successful experience in this branch of administrative justice. Lord M'Laren, in his interesting judgment, has made one criticism which, for safety's sake, may well be referred to. I do not understand the Court, in requiring one-half of the whole water of the river to flow down the old channel, to proceed upon or to assert any general principle of law, but to adopt that formula as an appropriate additional guarantee in the present case. Whether it has not a more general application, as founded on physical laws, has at least not been examined or decided in this action, and is a question which may recur in similar cases.

My Lords, in the result I am satisfied that this case has been dealt with in accordance with the rights and interests involved. I have, however, been unable to divest myself of the apprehension that, occurring as it does in a final decree which terminates the litigation, this order might prove inconveniently rigid. The flow of rivers is subject to inscrutable change, and it may be well to make it clear that the system now set up is calculated with reference to the existing condition of things, and might, in unforeseen contingencies, prove inadequate or inappropriate. Not, then, as inviting future litigation, but for preventing possible technical embarrassment, I suggest that, with our affirmance of these judgments, there should be coupled a declaration that, in the event of any future substantial change in the river affecting the interests of parties, neither party shall be held precluded by anything in the judgments affirmed from applying to the Court of Session, in any competent process, for remedy.

My Lords, I wish that I could say that I have any definite understanding of the theory of the cross appeal. As I consider the judgments impugned by it to be right, I think that it ought to be dismissed. It may be allowed to the cross appellants that Lord Kyllachy's later judgment purports, or at least may be read as purporting, to modify what had previously been done. But the ultimate decision was right, and, in my opinion, gives effect

H. L. (Sc.) 1906

ALEX. PIRIE & SONS, LIMITED v. KINTORE (EARL).

to the cross appellants' rights. The best that can be said of the cross appeal is that it has not substantially added to the costs of these elaborate proceedings.

LORD ATKINSON. My Lords, I have had the advantage of reading the judgment which has just been delivered by my noble and learned friend Lord Robertson. I entirely concur in it, and have nothing to add.

Ordered that the orders appealed from be affirmed, with a declaration that, in the event of any future substantial change in the river affecting the interests of parties, neither party shall be held precluded by anything in the judgments affirmed from applying to the Court of Session in any competent process for remedy : further ordered that the appeal be dismissed with costs.

Cross appeal : Ordered that the cross appeal be dismissed with costs.

Lords' Journals, July 16, 1906.

Agent for appellants : *John Kennedy, W.S., for Morton, Smart Macdonald & Prosser, W.S., Edinburgh.*

Agents for respondent : *A. & W. Beveridge, for Alex. Morison & Co., W. S., Edinburgh.*

[HOUSE OF LORDS.]

C. A. VAN EIJCK AND ZOON AND OTHERS . APPELLANTS; AND SOMERVILLE AND ANOTHER . . . . . RESPONDENTS.

H. L. (Sc.) 1906 July 20.

Ship—Collision—Both Ships at fault—Competency of reopening the Question of Damage at the instance of the Cargo Owners—Merchant Shipping Act, 1894 (57 & 58 *Vict. c.* 60), *ss.* 503, 504.

The finding of value in a collision action between the owners of two ships is not conclusive on the owners of cargo in ulterior proceedings.

A collision between the steamship *Anglia* and the steamship *Olga* resulted in the sinking of the *Anglia* and in the *Olga* being slightly damaged. In cross actions of damages between the owners of the *Anglia* and the owners of the *Olga* both vessels were found to be in fault, and the owners of the *Anglia* obtained a decree against the owners of the *Olga* for 7149*l.* 14*s.* 7*d.*, being one-half of the value of the *Anglia* after deducting one-half of the damage to the *Olga*. The owners of the *Olga* then presented a petition under ss. 503 and 504 of the Merchant Shipping Act, 1894, for limitation of their liability, and the owners of the *Anglia* lodged a claim in the petition claiming to be ranked and preferred on the fund for the full amount of the decree obtained by them against the *Olga*. The owners of the cargo of the *Anglia* at the time of the collision also claimed to be ranked on the fund to the extent of one-half of the value of the cargo lost by the collision, and contended that the decree for 7149*l.* 14*s.* 7*d.* was not binding on them; that the value of the *Anglia* on the basis of which that decree was obtained was an over-estimate of her true value; and that the owners of the *Olga* had no interest to contest the value of the *Anglia*, in respect that, once it was decided that both vessels were to blame, the question of exact values became immaterial to the owners of the *Olga*.

The Court of Session was of opinion that the claim of the owners of the *Anglia*, having been duly constituted against a debtor in foro, must be taken at the amount fixed in the collision action :—

Held (reversing the decision of the Court of Session), that the owner of cargo was not precluded from shewing the real value of the ship by the findings in an action to which he was no party and in which no one could be heard who was concerned to protect his interest.

APPEAL from a decision of the Second Division of the Court of Session, Scotland. (1)

The facts are sufficiently given in the opinion of Lord Loreburn L.C.

(1) (1905) 7 F. 739.

H. L. (Sc.) 1906 C. A. VAN EIJCK AND ZOON v. SOMERVILLE.

June 25, 26. *J. G. Spens* and *Alex. Ure* (Solicitor-General for Scotland), for the appellants. The value put on the *Anglia* in the collision action was grossly over-estimated, and is not binding on the appellants. It did not matter to the *Olga* what value was put on the *Anglia* after it was decided that both vessels were to blame. The decree of the value of the *Anglia* was not obtained in the presence of the owners of the cargo, nor was any evidence given as to the value. The petition for limitation of liability is not a process analogous to a sequestration, and examples from sequestration law cannot apply.

Pickford, K.C., and *Claus Rankin*, for the respondents. There was no evidence here of collusion; an agreement in the absence of third parties is not collusion. Here is a judgment in favour of the respondents for 14,000*l.* damages, which cannot be set aside unless fraud is shewn. The fact that the appellants were not parties to the collision action does not give them a claim to attack the decree in that action. [They referred to *The Harmonides* (1); *Miller, &c.* v. *Powell* (2); *The Franconia* (3); *In re Lennox.* (4)]

Alex. Ure (Solicitor-General for Scotland), in reply.

The House took time for consideration.

LORD LOREBURN L.C. My Lords, this is an appeal against the decision of the Court of Session in a proceeding under ss. 503 and 504 of the Merchant Shipping Act, 1894.

A collision took place between the *Olga* and the *Anglia*, and the Court held both ships to blame. It was found in the collision actions (for there were cross actions) that the loss of the owners of the *Anglia* was 14,687*l.* and that of the owners of the *Olga* 387*l.* 10*s.* 11*d.*, amounting together to the sum of 15,074*l.* 10*s.* 11*d.* Each ship was debited with half that sum, and after crediting the *Olga* with 387*l.* 10*s.* 11*d.*, the amount of her loss, the Court decerned against the *Olga* and in favour of the owners of the *Anglia* for the balance, viz., 7149*l.* 14*s.* 7*d.* This decree was sustained on appeal.

Thereupon the owners of the *Olga* petitioned in terms of ss.

(1) [1903] P. 1.
(2) (1875) 2 R. 976.
(3) (1878) 3 P. D. 164
(4) (1885) 16 Q. B. D. 315.

503 and 504 of the Merchant Shipping Act, 1894, for a limitation of their liability to the sum of 6215*l.* 4*s.*, and in the proceedings that ensued the owners of the *Anglia* claimed to be ranked and preferred on the fund for the full amount of the decree obtained by them against the *Olga*. Then the present appellants, C. A. Van Eijck and Zoon, owners of cargo on the *Anglia* at the time of the collision, claimed to be ranked and preferred on the fund to the extent of one-half of the value of the cargo belonging to them which was lost by reason of the collision.

In this claim the appellants, the cargo owners, disputed the value of the *Anglia*. They said that although in the collision action the Court had found that value to be 14,687*l.*, yet they were not parties to that action, and were not bound thereby. They alleged that the true value of the *Anglia* was about 7000*l.*, and suggested that, though not collusive in a dishonest sense, the owners of the *Olga* had failed from error or indifference to prove the excessive valuation put on the *Anglia* by her owners. Manifestly the appellants had a great interest in reducing the valuation of the *Anglia*, because, if it were reduced, there would be more of the fund left to satisfy their claims for damages.

The short question, therefore, is whether the finding of value in the collision proceedings between owners of the two ships is conclusive on owners of cargo in ulterior proceedings. With all respect to the learned judges of the Court of Session, I cannot think that it is. I do not enter upon the rule applicable to sequestration or the analogous rules of bankruptcy law in England. There is no authority, either in Scotland or in England, to shew that an owner of cargo in proceedings under the Merchant Shipping Act is foreclosed as to the value of the ship by findings in an action to which he was no party, and in which no one could be heard who was in the least concerned to protect his interest. I am not prepared to concur in initiating any such doctrine. I do not in the least suppose that there was any collusion or impropriety of that kind in the present case. But it would be a dangerous thing to lay down that a man may be precluded from shewing the truth to the Court in regard to a matter directly affecting his own pocket merely because in an action between other people a decree had been obtained on such

H. L. (Sc.) 1906

C. A. VAN EIJCK AND ZOON v. SOMERVILLE.

Lord Loreburn L.C.

evidence and argument as they thought proper to adduce. It seems to me illusory to justify such a contention by saying that if there were fraud or collusion the decree could be set aside. It is very difficult to prove collusion, and I cannot see why, as regards third parties, a decree should be set aside on that ground and yet be allowed to stand, however unreasonable it may be, when the error is due to carelessness or incompetence or indifference. The innocent third party is equally injured whatever be the cause of error. I have the less hesitation in coming to this conclusion, because I am satisfied that values ascertained as in this case will rarely be disputed without just cause. The power of effectively awarding expenses when a complaint is unfounded will prove a sufficient deterrent.

My Lords, I have to add that my noble and learned friend Lord Macnaghten concurs in the conclusion at which I have arrived.

LORD JAMES. My Lords, I concur.

LORD ROBERTSON. My Lords, the question in this appeal is solely of the effect of the 503rd and 504th sections of the Merchant Shipping Act, 1894, and I have come to the conclusion that the appeal must be allowed.

The key to the question seems to me to be found in realizing the time at which the section operates, and the effect of the non-liability which it declares. Now in the long sentence, of which the relevant part of the section consists, the main proposition is that the owners indicated shall not be liable beyond the specified amounts. The time at which this state of the law is created is, in each case, the occurrence of the loss.

The 504th section is one of procedure, but it is correlative to s. 503. The normal procedure is for the owner at once to petition the Court to determine the amount of his liability (which clearly means merely the sum to which his limited liability amounts), and to distribute the amount rateably among the claimants; and it is significant that the Court petitioned has power to stay any proceedings in any other Court. The Court petitioned, be it observed, does not create the immunity which the 503rd section has done already. And the power to stay

proceedings is given to effectuate the immunity declared in the 503rd section.

In the present case, when the owner was attacked, he judged it well to dispute liability absolutely, joined issue, and was beaten. Now this may have been good policy or bad, but the question is whether his electing to adopt it can alter the rights of third parties. It seems to me that, in the scheme of the statute, it is a correlative of the limitation of liability that the rights of participants in the limited fund shall be determined in presence of those truly concerned.

My judgment is rested on the construction of the statute, and not on any general notion of the impossibility of a decree obtained against A. by B. availing against C., D., or E. in the event of a deficiency. "Vigilantibus non dormientibus jura subveniunt" is good bankruptcy law; and, so long as A. is allowed by C., D., and E. to stand on his legs as a solvent man, a decree obtained against him by B. for 100*l.* is conclusive, in a subsequent bankruptcy, against C., D., and E. (I speak, of course, of decrees which are not collusive, either in fact or by statutory presumption). On the other hand, the moment bankruptcy is declared, the bankrupt ceases to be the proper defender of his estate, and a decree against him will not conclude other creditors. Now, the decree founded on in the present case was pronounced after the defending shipowner had become immune from absolute liability; and the same principle as rules in bankruptcy points to that decree being inconclusive against competing creditors.

Interlocutor appealed from reversed, with a declaration that the owners of the Anglia *are bound to try again in this process the amount of the claim against the petitioners: further ordered that the respondents pay the appellants' costs both here and below.*

Lords' Journals, July 20, 1906.

Agents for appellant: *Waltons, Johnson, Bubb & Whatton, for Boyd, Jameson & Young, W.S., Edinburgh.*

Agents for respondents: *Thomas Cooper & Co., for Beveridge, Sutherland & Smith, S.S.C., Leith.*

[PRIVY COUNCIL.]

J. C.* 1906 *May* 15; *July* 16.

TRIMBLE AND ANOTHER . . . . . DEFENDANTS;

AND

GOLDBERG . . . . . PLAINTIFF.

ON APPEAL FROM THE SUPREME COURT OF THE TRANSVAAL.

Partnership—Purchase by two Partners without the knowledge of the third—Suits for an Account—Scope of the Partnership—Rights of Partners.

The respondent and the two appellants, under a partnership arrangement in 1902, bought with a view to resale the properties of H., consisting of stands or plots of land laid off for building, and of shares in a company entitled to other stands in the same locality. The appellants, apart from the respondent, purchased the company's other stands and made profits.

In a suit by the respondent for an account thereof the Court below held that, though the stands so purchased were not within the scope of the partnership of 1902, they were connected with it indirectly; that the purchase thereof by the appellants was secret and injurious to the common interest, and that the respondent was entitled to share in the benefit thereof:—

Held, reversing this decree, that it could not be supported on authority or on any recognized equity.

The purchase, not being within the scope of the partnership, was not shewn to have been in rivalry or any other connection therewith, nor in any way injurious thereto.

APPEAL from a judgment of the Supreme Court (May 16, 1905), reversing a judgment of the Witwatersrand High Court (March 17, 1905), and declaring that the respondent was entitled to the benefit of a purchase of certain stands or building plots in Johannesburg.

The question decided in the appeal was whether, under the circumstances stated in their Lordships' judgment, the purchase was on behalf of the appellants and respondent jointly, or whether the appellants were entitled to effect the said purchase on their own account to the exclusion of the respondent.

The First Court found that the purchase was not within the

* *Present:* THE EARL OF HALSBURY, LORD MACNAGHTEN, SIR ARTHUR WILSON, and SIR ALFRED WILLS.

scope of the partnership subsisting between the appellants and respondent, and dismissed the suit of the latter for an account of the profits thereof. The appellate Court, on the contrary, held that the purchase in question, otherwise than for the benefit of the partnership, would be a breach of the obligations of good faith imposed upon the appellants by their fiduciary relation towards the respondent, their co-partner. Stress was laid by Mason J. upon the necessary conflict of interest and duty which arose so soon as the purchase was attempted to be made otherwise than on account of the partnership of property in which the three partners were jointly interested as shareholders in the company to which the stands belonged.

Upjohn, K.C., F. Gore-Browne, K.C., and *F. H. Schwann*, for the appellants, contended that, the purchase in question not being within the scope of their partnership with the respondent, the appellants owed no duty to the respondent in relation thereto. There was no breach of good faith, the purchase was not prejudicial to the interests of the partnership, and the respondent had no legal or equitable claim to share in the profits. If he had any claim he should shew that, as soon as he learned of the transaction, he elected to accept both the burden and the benefit. He was not entitled to wait till the transaction was shewn by results to be profitable. If he founded his suit on damage to the interests of the partnership his remedy was for damage in respect thereof, the nature and extent of which should be alleged and proved. A third share of the profits of the new transaction could not be assumed to be the correct measure of those damages. They referred to *North-West Co.* v. *Beatty* (1); *Featherstonhaugh* v. *Fenwick*. (2)

Neville, K.C., and *R. J. Parker*, for the respondent, contended that the relationship between the parties was such that the appellants were in equity precluded from purchasing the stands in question for their own benefit to the exclusion of their co-partner. It was to the interest of the partners as joint shareholders in the company to which the stands belonged that e price obtained should be the highest; it was to the interest

(1) (1887) 12 App. Cas. 589. (2) (1810) 17 Ves. 298.

J. C. 1906 TRIMBLE v. GOLDBERG.

of the appellants to buy at the lowest property in which all three were interested. The purchase was a breach of good faith which partners owed to each other, and a misuse of partnership information as to the value of the stands, and was made secretly without the respondent's knowledge and consent. Reference was made to *Russell* v. *Austwick*. (1)

Upjohn, K.C., replied.

1906 *July* 16.

The judgment of their Lordships was delivered by

LORD MACNAGHTEN. This is an appeal from an order of the Supreme Court of the Transvaal reversing the judgment of the Witwatersrand High Court at Johannesburg. That Court had dismissed with costs an action for account brought by the respondent Goldberg against the appellants Trimble and Bennett, who were associated with him in a certain partnership adventure.

The trial of the action took place before Smith J. On all questions of disputed fact and on all questions of law but one the learned judges of the Supreme Court agreed with the trial judge. On one point they differed from him. Founding their opinion on an equity he had failed to appreciate or discover, they entered judgment for the respondent declaring him entitled to share with the appellants in the profits of a purchase which they had made secretly and meant to keep to themselves. Considering the purchased property, though not within the scope of the partnership adventure, yet connected with it indirectly, and thinking the purchase injurious to the common interest, they held on general principles that the appellants were liable to account to their partner for any profit derived from the transaction; and they regarded the veil of secrecy as a damning proof of guilt and an aggravation of the wrong of which, in their view, Goldberg was entitled to complain.

Goldberg was a land speculator. Trimble was an auctioneer: he had been acting chief detective of the whole of the Transvaal before the war. Bennett was a merchant in Durban in a good financial position. The partnership agreement between Goldberg, Trimble, and Bennett was dated February 10, 1902. The

(1) (1826) 1 Sim. 52.

object of the joint adventure was the purchase and re-sale of certain properties belonging to a gentleman named Hollard. They consisted of 5500 shares in a company called the Sigma Syndicate, besides stands or plots of land laid off for building and other real estate in Johannesburg and elsewhere in South Africa.

There was nothing special in the partnership agreement of February 10, 1902. Profits and losses were to be shared equally. No partner was to sell or dispose of his interest without the consent in writing of his partners. All dealings with the property of the partnership were to be transacted by and through Trimble, to whom the other partners were to give powers of attorney.

The Sigma Syndicate, whose full title was the Sigma Building Syndicate, Limited, had been formed in 1896 under the laws of the South African Republic with limited liability. Its capital was 25,000*l.*, divided into 25,000 shares of 1*l.* each all fully paid up. The Board of Directors was to consist of at least four and at most six members of the company. The management of the company's affairs was committed to the board "with the most extended powers and without limit or reserve." The powers of the board specially enumerated included "any purchase, sale, or exchange of immovable properties."

The syndicate was formed for the purpose of making profit by purchasing and re-selling a number of stands on Marshall Square and Government Square in Johannesburg.

In the early part of 1902 Hollard, a wealthy man and a director of the Sigma Syndicate, was about to leave South Africa and anxious to dispose of everything he had there before quitting the country. He put all his properties on the market for sale through Goldberg. Goldberg was furnished with a prospectus or proposal containing a schedule of the various lots shewing the aggregate price of the lots and the value placed on each. The total was 94,566*l.* The Sigma shares were put at 30,000*l.* The prospectus was accompanied by an elaborate report prepared by a Mr. Dumat, an attorney in Johannesburg. Goldberg's original intention seems to have been to form a syndicate for the purpose of purchasing the property, charging the syndicate 9500*l.* as

J. C. 1906 TRIMBLE v. GOLDBERG.

commission for his services. The gentlemen who were to compose the syndicate wanted further time. After carefully considering Dumat's report and expressing no little disappointment and dissatisfaction with it, Goldberg advised Hollard not to grant an extension of time to the syndicate, and proposed to accept Hollard's offer and buy on his own account. Bennett and Trimble joined him in the adventure. The one would not come in without the other, and so the syndicate disappeared, and the partnership agreement of February 10, 1902, was arranged. To meet Hollard's requirements a remittance of 12,500*l.* was telegraphed in advance, and Trimble was despatched to Johannesburg to complete the business.

Armed with powers of attorney from his two partners, Trimble went to Johannesburg, saw Hollard there, and settled the terms of the purchase offhand. The purchase deed was executed by Hollard and by Trimble on behalf of himself and his partners on February 14, 1902. The purchase price as proposed was 94,566*l.* The sum of 12,500*l.*, which had been sent forward, was taken as part payment; the balance was secured by mortgage bonds over the several properties comprised in the purchase.

After this matter was settled, Trimble went one day with Hollard to see the stands belonging to the Sigma Syndicate. When they came to Government Square Trimble asked Hollard if the syndicate would sell the stands there en bloc. Hollard said "Yes," adding that he thought the board would sell for 120,000*l.* Trimble asked about conditions, and Hollard referred him to Davis, the secretary, who would, he said, lay the matter before the board. It seems that the syndicate had tried without much success to sell their stands. They had put them up for sale by auction, but had only managed to sell one stand on Marshall Square. The board, holding as they did 23,000 shares out of 25,000, decided in the presence of all the shareholders to take 100,000*l.* for their stands on Government Square, and negotiations were going on with the Government or the private secretary to his Excellency on that footing. Trimble, of course, was not made aware of this fact, and after some negotiation with Davis he was content to take an option to buy for 110,000*l.*

Trimble at once communicated with Bennett, and told him that he thought from some secret information he had gained, which it seems would not bear the light, that money was to be made out of the deal. He asked Bennett to join with him in the speculation, intimating that he was prepared to give even a larger price. Bennett consented to join, and agreed to finance the enterprise. The directors of the syndicate were only too glad to accept Trimble's offer, and thus he secured the stands on Government Square for himself and Bennett at the price of 110,000*l*.

Goldberg was not told anything about this purchase at the time. He did not hear of it until the end of 1902 or some time in 1903. Meeting Trimble one day in the street he said, according to Trimble's uncontradicted evidence, corroborated by an accountant called Winship, who was present, "Don't you think you might have let me have 'a show in?'" Later on, however, he took a more exalted view of his rights, and in June, 1904, he brought this action, alleging, in the first place, that the partnership had given Trimble a mandate to buy the stands on joint account—an allegation which both Courts held not proved. He also contended that, on general principles applicable to all cases of partnership, he was entitled to share with his partners in the benefit of their purchase. On this ground the Court of Appeal gave effect to his claim.

It seems to their Lordships that the judgment of the Court of Appeal is not well founded. The purchase was not within the scope of the partnership. The subject of the purchase was not part of the business of the partnership, or an undertaking in rivalry with the partnership, or indeed connected with it in any proper sense. Nor was the information on which it seems Trimble acted acquired by reason of his position as partner, or even by reason of his connection with the Sigma Syndicate. The way in which the information was acquired may have been much to Trimble's discredit, as the Court of Appeal has pointed out; but Goldberg is not in a position to complain of that. He at least is not averse to sharing the profit to which it seems to have conduced.

Now if the purchase from Hollard had been completed so far

J. C. 1906 TRIMBLE v. GOLDBERG.

as to make the partnership the absolute and unincumbered owner of the 5500 shares in the Sigma Syndicate, and if those shares had been divided between the three partners and registered in their separate names, any one of the three would have had as good a right to buy any property of the syndicate which the directors might think fit to offer for sale as any other shareholder in the syndicate or any member of the general public.

The Court of Appeal appears to have regarded the purchase in question, though not expressly prohibited by the partnership articles, as a breach of good faith and consequently as a violation of the fundamental condition of the partnership. Suppose it had been forbidden in express terms, what would have been the result? The other partner or partners discovering the breach of contract might have claimed immediate dissolution, or even damages, on proof of actual loss to the partnership. But a claim to share in the profits of the forbidden purchase would not have been warranted by principle or precedent. And here there was no loss to the partnership; only a disappointment to the partner left out in the cold. The purchase apparently was an advantage to the partnership. Through it the directors of the Sigma Syndicate were enabled to obtain for their property 10,000*l.* more than they would have obtained if they had sold to the Government at their own price. And the partnership, as a shareholder in the syndicate, was proportionately the gainer.

The Court of Appeal seems to have been much impressed by the secrecy of the transaction. No doubt it would have been better if Goldberg had been told at the time that Trimble and Bennett were making this purchase. In a case in the House of Lords, which will be mentioned presently, in which the circumstances were somewhat analogous, Lord Blackburn observed, "I generally think it is advisable as a matter of prudence, as well as on other grounds, to let everything be above board." That is a very proper sentiment, worthy, perhaps, of a more unhesitating acceptance. But still there was no legal obligation on Trimble or Bennett to tell Goldberg what they were doing unless he had a right to take part in the speculation if he chose to do so. Their excuse for silence, if it be an excuse, was that

they considered Goldberg an undesirable partner and not financially strong.

The learned judges of the Court of Appeal also seem to lay some stress on a provision in the articles of association of the Sigma Syndicate which states that "Each share gives, according to the issued shares, a right to a proportionate share in the ownership of the company's assets and in the distribution of profits." But there is nothing special in that provision. It is no more than an accurate description of the position of every shareholder in every trading company limited by shares.

Then there was an argument which it is very difficult to follow. It was said that the moment Trimble determined to buy these stands, he put himself in a position in which his interest and his duty conflicted. It was his interest to buy as cheaply as he could. It was his duty to sell the Sigma shares as dearly as possible. The value of the shares depended on the value of the stands, and so it was his duty to enhance the value of the stands by every legitimate means in his power. He ought not to have thought of buying them for less than the utmost price he felt he might have been forced or tempted to give. He knew he was buying cheaply; he told Bennett so. The fallacy of this line of argument lies in assuming that Trimble had anything to do with selling the stands, or any right to meddle with the conduct of the sale. That was in the hands of the directors. They were dealing at arm's length with him. It seems extravagant to suppose that he would have advanced the interests of the partnership by retiring from the field and declining to enter into a competition which actually had the effect of raising the price of the stands and so improving the value of the Sigma shares.

No authority was cited in support of the conclusion at which the Court of Appeal arrived. But there are several cases in which arguments similar to those which prevailed with that Court have been urged, and urged unsuccessfully. Perhaps the most instructive cases are *Dean* v. *MacDowell* (1) and *Cassels* v. *Stewart*. (2) The two cases have much in common, and it will be sufficient to refer to the latter.

(1) (1878) 8 Ch. D. 345. (2) (1881) 6 App. Cas. 64.

J. C. 1906 TRIMBLE v. GOLDBERG.

In *Cassels* v. *Stewart* (1), which was an appeal from two concurrent judgments in Scotland, three gentlemen, Reid, Cassels and Stewart, were partners in an undertaking called the Glasgow Iron Company. The contract of co-partnership contained an article forbidding any partner to assign his interest, or give any person or persons a right to interfere with the business, and declaring further that any such assignation should be of no effect as regards the company. There was also a clause declaring that, on the retirement of a partner, the remaining partners should have power to buy his interest at the amount standing to his credit at the last balance. Reid sold all his interest to Stewart. Reid's name, however, remained on the books, and he signed all deeds relating to the business until his death, which occurred seven years after the sale. Cassels was not till then informed of the arrangement. When he found it out he claimed to participate in the purchase on the ground—(1.) that a mandate had been given to Stewart to buy Reid's interest for the partnership; (2.) that under the terms of the partnership agreement the purchase could only be legally made with his consent; and (3.) that Stewart had secretly acquired a benefit for himself within the scope of the partnership business. It was held that the alleged mandate was not proved. But it was argued by Sir F. Herschell, then Solicitor-General, and the Lord Advocate that, putting aside the alleged mandate, "the agreement was entered into under such circumstances as entitled the appellant to participate in it," "the acquisition of the shares of outgoing partners . . . . was one of the objects of the company." "Apart from the express terms of the contract the secret agreement by which the respondent acquired for himself alone a benefit falling within the scope of the partnership business was a breach of the good faith of the partnership, and when such a benefit was acquired each partner had a right to demand that it should be communicated to each of them equally"—"on general principles it was inequitable, having regard to the fiduciary relations due to each other, that such an agreement should be made behind the back of another partner." Without calling on the respondent, the House, consisting of Lord Selborne L.C.

(1) 6 App. Cas. 64.

J. C.
1906
TRIMBLE v. GOLDBERG.

and Lords Penzance, Blackburn and Watson, dismissed the appeal.

It seems to their Lordships that the decision of the Supreme Court of the Transvaal in the present case cannot stand with the decision in *Cassels* v. *Stewart.* (1) There was at least as close a connection between the partnership and the partner's purchase in that case as there is in this. In their Lordships' opinion the order under appeal cannot be supported on authority or on any recognized doctrine of equity.

Their Lordships will therefore humbly advise His Majesty that the appeal should be allowed, the order of Smith J. restored, and the appeal from that order dismissed with costs.

The respondent will pay the costs of the appeal.

Solicitors for appellants: *Loughborough, Gedge, Nisbet & Drew.*
Solicitors for respondents: *Telfer Leviansky & Co.*

[PRIVY COUNCIL.]

SPENCER . . . . . PLAINTIFF;

AND

REGISTRAR OF TITLES . . . . . DEFENDANT.

J. C.*
1906
June 19, 20; *July* 25.

ON APPEAL FROM THE SUPREME COURT OF WESTERN AUSTRALIA.

Western Australia Land Transfer Act, 1874—*Land Transfer Act*, 1893, *s.* 211—*Wrongful issue of Certificate of Title—Liability of Registrar of Titles—Damages.*

By deed of feoffment in 1841 the land in suit was effectually conveyed to trustees in trust for M, her heirs and assigns, to hold unto the trustees, their heirs and assigns for ever, upon certain special trusts directed to secure M.'s separate enjoyment during coverture and her testamentary power of appointment:—

Held that, on the true construction of this deed, the trustees, having regard to the habendum clause, took a legal estate in fee; that under the general trust M. took an equitable estate in fee, the special trusts not

---

* *Present:* EARL OF HALSBURY, LORD DAVEY, SIR ARTHUR WILSON, and SIR ALFRED WILLS.

(1) 6 App. Cas. 64.

J. C.
1906
SPENCER
v.
REGISTRAR
OF
TITLES.

being in any way inconsistent with, but rather ancillary to it; and that after her coverture ceased M., being sui juris, was competent to convey it.

Held accordingly, in a suit by the appellant as trustee and beneficiary under a deed of marriage settlement executed in 1846 by her in favour of her intended second husband for life, with remainders which, on his death, took effect, that he was entitled to claim against the respondent for deprivation of title in respect of a certificate of title wrongfully issued by him to F. under the provisions of the Western Australia Transfer of Land Act, 1874.

It appearing that F. derived title under what purported to be an absolute conveyance in 1848 of the land in suit by the feoffor and feoffees of the deed of 1841 and their mortgagee, and by the then trustees of the deed of 1846 and by the husband, who covenanted for title as if he were vendor:—

Held, that the appellant's suit must be decreed, for the interests in remainder were unaffected by the conveyance, and consequently F. had, after the husband's death, no beneficial interest in the fee simple conveyed.

Held further, that the trustee's right to sue accrued on the husband's death, and that, therefore, the suit was not barred by s. 211 of the Transfer of Land Act, 1893.

APPEAL from an order of the Supreme Court (April 5, 1905) upon a special case stated for its opinion.

The case is sufficiently set out in their Lordships' judgment. The Supreme Court directed that judgment be entered for the respondent. The Chief Justice said that it was clear that under the feoffment Mrs. Mayo only took an equitable interest for life with a power of appointment by will, and that she therefore was not at the time she executed the marriage settlement seised in fee simple of the land, and that she could not pass under it more than the interest she possessed. McMillan J. considered that the legal estate under the deed of gift passed to and remained in the trustees of the said deed, and that Mrs. Mayo took only an equitable estate for life with a power of appointment by will. Such being the opinion of the Supreme Court, it did not express an opinion as to other points raised in the action.

Upjohn, K.C., and *Higgins*, for the appellant, the trustee of Mrs. Mayo's marriage settlement, contended that, according to the true construction of the deed of feoffment in 1841, Mrs. Mayo took an estate in fee simple, viz., either a legal estate or, in the alternative, an equitable estate, and not, as held by the Court below, a mere life estate with a power of testamentary

appointment. The marriage settlement of 1846 was a valid and effectual settlement by her and bound the fee simple, and the appellant was now, in the events which had happened, entitled to the land in suit in trust for those interested in remainder. Farrelly under his conveyance was only entitled beneficially to such life interests as were created by the settlement, and his interest in the land had determined. The Court ought to have held that the appellant was entitled to damages for having been deprived thereof by reason of the wrongful issue of a certificate to Farrelly. Sect. 211 of the Transfer of Land Act, 1893, did not bar the action, because the right to sue did not arise till the death of Mrs. Mayo's husband, the tenant for life in 1903. They referred to the Transfer of Land Act, 1874, ss. 17, 18, 19; *Lassence* v. *Tierney* (1); *West* v. *Berney* (2); Farwell, pp. 16, 17, 18, where all the cases are considered.

Astbury, K.C., and *Stokes*, for the respondent, contended that on the true construction of the deed of 1841, Mrs. Mayo had, at the date of executing the marriage settlement of 1846, only an equitable interest for life in the land in suit, with a general power of appointment of the same by will. Accordingly the marriage settlement deed was inoperative to pass more than the life interest of Mrs. Mayo. The effect of the deed of 1848 was to vest the legal estate in the land in Farrelly; and to entitle him absolutely to the certificate of title which had been issued to him.

Upjohn, K.C., replied.

1906 *July* 25

The judgment of their Lordships was delivered by

Lord Davey. This is an appeal from an order and judgment of the Supreme Court of Western Australia, dated April 5, 1905. The subject of the appeal is the title to a parcel of land at Perth, in that Colony, described as "Perth Town Lot P. No. 8," of which one Terence Farrelly became the registered proprietor, and in respect of which a certificate of title was granted to him under the provisions of the Transfer of Land Act, 1874, on December 16, 1875. The appellant contends that but for the grant of such certificate he would now be entitled to the land as sole existing trustee of a settlement dated October 6, 1846, and

(1) (1849) 1 Mac. & G. 551. (2) (1819) 1 Russ. & My. 431.

J. C. 1906 SPENCER v. REGISTRAR OF TITLES.

made on the marriage of his father, Henry Spencer, with his mother, who was then a widow named Sarah Hannah Eyles Mayo. The appellant is also a beneficiary under the same settlement. By his writ in the action he claims damages for being deprived of the land by the issue of this certificate to Farrelly. A special case was stated in the action. It contains a statement of the instruments constituting the respective titles of the appellant and Farrelly, and the questions for the consideration of the Court are, shortly:

1. Whether the plaintiff is entitled to claim for deprivation of title.

2. Whether the plaintiff's alleged claim is barred by s. 211 of the Transfer of Land Act, 1893.

3. If the first question be answered in the affirmative, and the second in the negative, what is the measure of damages?

The answer to the first two questions has been treated in argument as depending exclusively on the construction of two deeds.

By a deed of feoffment with livery of seisin, dated October 20, 1841, and made between one Thomas William Mews the younger, of the one part, and Thomas Mews the elder and Samuel Cox, described as "trustees for Sarah Hannah Eyles Mayo (which said Sarah Hannah Eyles Mayo is the wife of Louis de Mayo, but now living separate from him)," it was witnessed that Thomas William Mews the younger, as well in consideration of his natural love and affection for his sister, Mrs. Mayo, as also for her better maintenance, support, livelihood, and preferment, enfeoffed to Thomas Mews the elder and Samuel Cox, in trust for Mrs. Mayo, her heirs and assigns, the parcel of land in question, to hold unto Thomas Mews the elder and Samuel Cox, their heirs and assigns for ever, upon the trusts thereinafter mentioned (that is to say) in trust to receive and pay the rents, &c., of the said parcel of land, and apply the same to the use, purposes, and designs of Mrs. Mayo as she should from time to time direct, and upon further trust in the event of Mrs. Mayo's death, to grant and assign the same to such persons as she should appoint by will.

The point argued on behalf of the appellant in the Supreme

Court seems to have been that Mrs. Mayo under this deed of feoffment took a legal fee. The Court decided against this contention, and their Lordships think rightly. The first question to be answered is, What estate did the feoffees take? and this is a purely legal one. Their Lordships agree with the learned judges that, although the habendum cannot retract the gift in the premises, it may construe and explain the sense in which the words in the premises should be taken, and that it is upon a view of the whole deed that the intent of the parties must be collected. Their Lordships also agree that the want of the necessary words of limitation in the premises may be corrected and supplied by the habendum, and that the existence of a special and active trust during Mrs. Mayo's life is sufficient to shew that the deed was intended to operate by the common law and not by the Statute of Uses. The feoffees, therefore, took the legal estate in fee. It is a totally different question what equitable estate Mrs. Mayo took, and on this question their Lordships are unable to agree with the Court below. The general trust imposed on the legal estate in fee thus taken by the feoffees is for Mrs. Mayo, her heirs and assigns. The special trust following upon the habendum to the feoffees is not in any way inconsistent with the equitable fee simple thus created, but is ancillary to it, and makes the instrument effectual for securing to the cestui que trust the actual enjoyment of the property during her life, and the power of disposing of it after her death. It is hardly necessary in this case to invoke the principle acted on by Lord Cottenham in *Lassence* v. *Tierney* (1): "If a testator leaves a legacy absolutely as regards his estate, but restricts the mode of the legatee's enjoyment of it to secure certain objects for the benefit of the legatee—upon failure of such objects, the absolute gift prevails."

That was a case of a will, but the principle is equally applicable to a deed where there are sufficient technical words, and the intention is to be collected from a view of the whole instrument. The learned judges seem to have treated the special trust as an exhaustive explanation of the meaning of the earlier trust, but that construction neglects and gives no effect to the words of limitation in the earlier trust. Their Lordships are of opinion

(1) 1 Mac. & G. 551.

J. C. 1906 — SPENCER v. REGISTRAR OF TITLES.

that under the deed of feoffment Mrs. Mayo took an equitable estate in fee simple, subject to a trust for securing to her the enjoyment of the income for her separate use during her coverture, and a testamentary power of appointment.

By an indenture dated May 28, 1842, to which Thomas Mews and Samuel Cox (the trustees under the deed of feoffment), Mrs. Mayo, Henry Spencer (described as her "next friend"), and Thomas William Mews (the feoffor) were parties, Mrs. Mayo purported to convey, and the trustees at her request conveyed, and Thomas William Mews confirmed, "Perth Building Lot No. 8" to one Thomas Helms in fee, subject to a proviso for redemption on payment by Mrs. Mayo, or Henry Spencer, or her trustees, to Helms of 50*l.* and interest.

Mrs. Mayo was still under coverture at the date of this mortgage, but her husband was not a party to it, and her execution was not witnessed by a justice of the peace, nor does it appear that she was first separately examined as required by the Act of 1833 (2 Will. 4, No. 7). The deed was not, therefore, effectual to pass her equitable fee. But the legal estate became vested in Helms.

Mrs. Mayo's first husband seems to have died shortly after the execution of the mortgage to Helms, and on October 7, 1846, she was married to Henry Spencer.

Previously to and in contemplation of this marriage a settlement dated October 6, 1846, was made whereby "Perth Building Lot No. 8" was conveyed by Mrs. Mayo to Thomas Helms and Alfred Hawes Stone, their heirs and assigns, to the use of Henry Spencer for life, with remainder to the use of Mrs. Mayo for life, and after the death of the survivor of them, upon trust to sell the land and divide the proceeds between all the children of Mrs. Mayo before marriage to Henry Spencer and to her children after the then intended marriage, to be vested as therein mentioned.

This settlement was registered in the then Office for the Registration of Deeds on October 13, 1847. Mrs. Mayo was, at the date of the execution of the settlement, sui juris, and could release the trusts for her separate use during her life, and her testamentary power of appointment created by the deed of

feoffment. She was therefore competent to convey the equitable fee simple. The mortgage is not recited in the settlement, and the conveyance is not made subject to it, yet, oddly enough, Helms, the mortgagee, is one of the trustees. As already observed, however, the mortgage did not in fact bind her estate.

By a deed dated January 8, 1848, to which Henry Spencer and his wife, the trustees under the deed of feoffment, the feoffor himself, and Terrence Farrelly were parties, after a recital that Spencer, at the request of his wife, had agreed with Farrelly for the sale to him of the land in question for 70*l*., out of which Helms' mortgage was to be paid off, it was witnessed that Helms, by the direction of Spencer and his wife, and Spencer by her direction, and the trustees of the deed of feoffment at her request, and Thomas William Mews, the feoffor, purported to convey the parcel of land called "Perth Building Lot No. 8" to Farrelly, to uses equivalent to the fee simple in his favour, and it was declared that for the protection of Farrelly from all mesne charges (if any), whether he had any actual or constructive notice thereof or not, the mortgage debt, interest, and security should henceforth be considered as being still on foot and unmerged. It should be added that Spencer entered into full covenants for title as if he were vendor.

This deed was registered on January 11, 1848, and on the passing of the Transfer of Land Act, 1874, the land which is the subject of it was brought under the operation of that Act, and a certificate of title was issued to Farrelly as already mentioned.

The legal estate in the land passed from Helms to Farrelly, and no doubt Spencer's life estate under the settlement also passed by the conveyance to Farrelly. Spencer survived his wife and did not die until June 25, 1903, so that she never acquired any estate or interest in possession under the settlement. The interests of those entitled in remainder after the death of the survivor of the husband and wife were (in the view taken by their Lordships) unaffected by the conveyance. The result is that Farrelly acquired no beneficial estate or interest in the fee simple, and the certificate was wrongly issued to him.

It is stated in the special case that one of the contentions made on behalf of the respondent was that Farrelly was a purchaser

J. C. 1906 SPENCER v. REGISTRAR OF TITLES.

for value without notice. But the special case does not find either that Farrelly had, or that he had not, notice of the settlement. The point, though mentioned in the respondent's case, was not relied on by his counsel before their Lordships.

Their Lordships are further of opinion that the title of the appellant to commence this action accrued on the death of Spencer when the trust for sale of the property came into operation. And in that case the learned counsel for the respondent admitted that the appellant was not barred by s. 211 of the Transfer of Land Act, 1893.

The third question in the special case relates to the measure of damages. This question has not been argued before their Lordships.

Their Lordships will therefore humbly advise His Majesty that the order of the Full Court, dated April 5, 1905, and the judgment of the same date, be discharged, and that instead thereof, it be ordered that the first question be answered in the affirmative and the second question be answered in the negative, and that the costs of the hearing of the special case in the Full Court be costs in the cause, and that all further proceedings in this action be remitted to the Supreme Court of Western Australia. The respondent will pay the costs of this appeal.

Solicitor for appellant: *Henry Danger.*

Solicitors for respondent: *Sutton, Ommanney & Rendall.*

[PRIVY COUNCIL.]

DUNDEE COAL COMPANY, LIMITED . . DEFENDANTS;

AND

MINISTER OF AGRICULTURE OF THE COLONY OF NATAL . . . . . PLAINTIFF.

J. C.*
1906
June 22;
July 24.

ON APPEAL FROM THE SUPREME COURT OF NATAL.

Natal Mines Act, 1899, *s.* 25—*Construction—Private Coal Fields—Royalties on Coal extracted.*

Held, that the appellants, who owned and worked their collieries before the passing of the Natal Mines Act, 1899, their title to do so having been expressly affirmed by Law No. 34 of 1888, were, by the true construction of s. 25 of the Act of 1899, exempted from liability to take out licences for working the same, and consequently from liability to pay royalties on the coal extracted therefrom.

APPEAL from the judgment of the Supreme Court of Natal (May 1, 1905), whereby the appellants were declared liable to pay to the respondent a royalty on their output of coal between November 15, 1900, and December 31, 1903.

It was held by the Court below that the effect of the Natal Mines Act, 1899, according to its true construction, was to impose on the appellants the liability to pay royalties in respect of coal got by them after the passing of the Act from their old mines, which they had been working for many years prior to the Act.

Sir R. Finlay, K.C., *C. E. Jenkins, K.C.*, and *J. W. M. Holmes*, for the appellants, contended that by that Act, when read with antecedent legislation, royalties were only imposed in respect of minerals extracted by the holders of licences granted under the Act. By the joint operation of ss. 25 and 42 of that Act the appellants were entitled to extract coal from these mines without taking out licences. Under the Natal Mines Law, 1888, the appellants were entitled to extract their coal free of royalty: see s. 31. The Act of 1899 did not interfere with this right, did not require them to take out licences, or to pay royalties.

* *Present:* THE EARL OF HALSBURY, LORD DAVEY, SIR ARTHUR WILSON, and SIR ALFRED WILLS.

J. C.
1906
DUNDEE COAL COMPANY, LIMITED v. MINISTER OF AGRICULTURE OF THE COLONY OF NATAL.

Danckwerts, K.C., and *Hansell*, for the respondent, contended that by the true construction of ss. 41 and 42 of the Act of 1899 royalties on coal extracted from private lands were payable to the Government. The regulations as to licences prescribed thereby for mining coal and payment of royalties with reference to Crown lands are applicable also to private lands, with the modification that in the case of private lands only one-half of the royalties imposed on coal extracted from Crown lands is payable. The Act formed a code regulating all coal mining in the Colony, and applies to all lands worked for coal after the Act, including lands which were being so worked prior thereto. The Act repealed the Natal Mines Law, 1888, providing, however, that such repeal should not affect—s. 2 (*c*)—any right, title, interest or privilege acquired not being inconsistent with the Act.

Counsel for the appellants were not heard in reply.

1906
July 24.

The judgment of their Lordships was delivered by

SIR ARTHUR WILSON. The question raised upon this appeal is whether the respondent, as representing the colonial Government, is entitled to recover from the appellant company, under the Natal Mines Act, 1899, royalty in respect of coal raised after the passing of that Act from collieries which were owned by and worked by the appellants before the passing of the Act.

The Natal Mines Act, 1899, under which the royalties are claimed, is No. 43 of 1899. It repealed certain earlier laws and proclamations, but enacted (s. 2) that such repeal should not affect (1.) "any right, title, interest or privilege acquired (not being inconsistent with this Act) . . . . under any of the said laws and proclamations." The general scheme of the Act embodied a system of claims, licences, and royalties.

The more important enactments of the Act are the following:—

"PART I.

* * * * *

"8 Parcels of land to be called claims may be granted under and subject to the provisions of this Act as follows:—

"Alluvial claims of a size not exceeding 100 feet by 100

feet (0·229 acre) granted for the purpose of prospecting or mining for precious stones and alluvial minerals, and all other minerals.

"Metal claims of a size not exceeding 300 yards by 300 yards (18·595 acres) granted for the purpose of prospecting or mining for gold and other minerals, including coal, but excepting precious stones and alluvial minerals.

"Mineral claims of a size not exceeding 700 yards by 700 yards (101·239 acres) granted for the purpose of prospecting or mining for coal, limestone, stratified ironstone, slate, soapstone, and such other minerals as may from time to time be included by Government notice by order of the Governor in Council.

"The foregoing claims may be granted as prospecting or mining claims for the purposes respectively prescribed by this Act, and shall be described as follows:—

"Alluvial prospecting claims.

"Alluvial mining claims.

"Metal prospecting claims.

"Metal mining claims.

"Mineral prospecting claims.

"Mineral mining claims.

"PART II.—RIGHTS OF THE CROWN.

"9. The right of mining for and disposing of all minerals on lands situated in the Colony of Natal is vested in the Crown, subject to the provisions of this Act, and nothing in this Act regarding the prospecting, mining, or disposing of minerals, shall abridge or control the rights and powers of Her Majesty in respect of such minerals otherwise than is expressly provided in this Act."

Part III., under the heading "Crown Lands. Prospecting," provides for prospecting and prospecting licences, leading up in ordinary course to mining licences. In the same part, under the heading "Mining," there is the following section:—

"25. The mining, extraction, and disposal of any mineral for the purposes of profit on or from any Crown lands is prohibited, except on and from ground duly registered as a mining claim

J. C. 1906

DUNDEE COAL COMPANY, LIMITED v. MINISTER OF AGRICULTURE OF THE COLONY OF NATAL

in accordance with this Act, or otherwise lawfully held for such purposes under the provisions of any previous laws or proclamations."

Sect. 41, under the same heading, is as follows:—

"There shall be payable on all minerals extracted from the Crown lands under licences granted under this Act a royalty at the rate of one and one half ($1\frac{1}{2}$) per centum calculated on the value of such minerals at the mine.

"The payment of such royalty shall be made at such times as may be provided in the regulations."

Under the heading "Part IV.—Private Lands," occurs s. 42, which is as follows:—

"42. The provisions of this Act and of the regulations framed thereunder in respect of Crown lands, shall apply to all private lands, save as in this Act otherwise provided."

The sections which, if any, establish the liability contended for are s. 41, imposing a royalty upon minerals extracted from Crown lands, and s. 42, which is said to extend that liability to private lands. The royalty imposed by s. 41 is upon minerals extracted "under licences granted under this Act." This throws us back upon s. 25, to see in what cases a licence under the Act was legally necessary. That section in effect requires a licence to be obtained in all cases, except where mining is from ground "otherwise lawfully held for such purposes under the provisions of any previous laws or proclamations." This again makes it necessary to inquire whether at the time when the Act of 1899 was passed the ground in question was "otherwise lawfully held for such purposes under the provisions of any previous laws or proclamations." And to that question there seems to be only one answer. Prior to 1899 the appellants were the owners of the coal mines in question, and were working them as such, and their title to do so was expressly affirmed by s. 31 of the Law No. 34 of 1888. This aspect of the case does not seem to have been presented for the consideration of the learned judges who heard the case in Natal. But to their Lordships it has been presented, and it appears to them to be conclusive of the case.

Their Lordships will humbly advise His Majesty that the

judgment appealed against should be discharged, and the suit dismissed with costs.

The respondent will pay the costs of this appeal.

Solicitors for appellants: *Ingle, Holmes, Sons & Pott.*
Solicitors for respondent: *Sutton, Ommanney & Rendall.*

J. C.
1906
DUNDEE COAL COMPANY, LIMITED v. MINISTER OF AGRICULTURE OF THE COLONY OF NATAL.

[PRIVY COUNCIL.]

GEORGE D. EMERY COMPANY . . . . . DEFENDANTS;

AND

WELLS . . . . . PLAINTIFF.

J. C.*
1906
June 27, 28, 29; *July* 24.

ON APPEAL FROM THE SUPREME COURT OF BRITISH HONDURAS.

Consolidated Laws of British Honduras, Part VI., c. 13, s. 213—New Trial must be on Motion—Judgment, in the absence of New Trial, must be entered according to the Findings—Construction of Contract—Breach—Repudiation.

Consolidated Laws of British Honduras, Part VI., c. 13, s. 213, which prescribes that a new trial must be applied for by motion within a specified period after the trial, is imperative, and in appeal from judgment entered after verdict their Lordships have no power to relax or dispense with it:—

Held, in such appeal, that, as no such motion had been made, no contention directed to a new trial was open to the appellants, and that consequently all questions as to a miscarriage of the trial, or as to any point having been wrongfully left to the jury, or as to misdirection, improper admission of evidence, or as to the correctness of the findings were excluded; and that the only question open was whether the judgment in favour of the respondent was justified by the findings.

Held, also, that as the question in this case as to the breach of the contract sued upon going to the root thereof so as to entitle the respondent to repudiate it depended upon the construction of a written document, the judge was right in deciding it himself, and a finding of the jury on the point was not necessary.

APPEAL from a judgment of the Supreme Court (July 25, 1905) to the effect that the respondent recover $11,974 on his claim and dismissing the appellant's counter-claim.

The action was brought on the contract set out in their

* *Present:* LORD DAVEY, SIR ARTHUR WILSON, and SIR ALFRED WILLS.

J. C. 1906 GEORGE D. EMERY COMPANY v. WELLS.

Lordships' judgment. The trial was held before the Chief Justice, who put to the jury the questions detailed in that judgment, and entered the judgment appealed from in accordance with their findings.

He held that under the circumstances which are set out in their Lordships' judgment the respondent was entitled to payment of the 50 per cent. advance which he claimed, and that on the appellant's failure or refusal to pay he had two alternatives, either to let the agreement go on and sue the defendants for this balance, or to submit that the breach of contract on the defendants' part entitled him to consider the agreement at an end, that he was discharged from any further performance on his part, and that he was entitled to damages from the defendants for his present and prospective injuries. With regard to the breach of contract entitling the respondent to consider the contract at an end, the Chief Justice held that it must go to the root of the contract, saying: "Now I am not losing sight of the answer of the jury to question 11, but I fear it will not avail the defendants. It is quite clear that the reason the defendants had for not paying the balance of the $1153·47 was because they contended the wood was not on the bank of the river within the meaning of the agreement, which contention has not been upheld by the jury. The matter was vastly more important to Mr. Wells than the mere non-payment of the sum of $1153·47 due on a particular parcel of wood. It meant that all through the years this agreement lasted he could not get 50 per cent. of the purchase price of the wood which he should cut and place on the banks of the three branches and Cockscomb Creek."

Under s. 58 of c. 8 of the Consolidated Laws the appellants filed their notice of intention to appeal to His Majesty in Council from the said judgment on five grounds—(1.) that the Chief Justice was not justified by the findings of the jury in concluding that there had been "such a breach by the defendants of the contract as would justify the plaintiff in refusing to be bound thereby"; (2.) that he was wrong in disregarding the answer to question 11; (3.) that the plaintiff should have exercised his right (if any) "before proceeding to remove the wood from the

bank of the river and otherwise to deal with the said wood"; (4.) that the damages were calculated upon a wrong principle, inasmuch as the defendants were not allowed the expenses of bringing the wood to the bar of Monkey River; (5.) that $1153·47 were the highest damages which could be awarded on the findings of the jury.

Sanderson, K.C., Woods and *Davenport,* for the appellants, contended that the verdict and judgment were wrong, and ought to be set aside and judgment entered for the appellants, both on the claim and counter-claim, or that the damages awarded by the jury should be reduced or that a new trial should be ordered. They contended that the jury had been asked to construe the contract, that no breach had been found, and no finding that the breach (if any) went to the root of the contract. They referred to *Mersey Steel and Iron Co.* v. *Naylor, Benzon & Co.* (1); *Bloomer* v. *Bernstein* (2); *Freeth* v. *Burr* (3); Sale of Goods Act, s. 27 and s. 28, s. 31, sub-s. 2; *Morgan* v. *Bain.* (4)

Shearman, K.C., and *Cowell,* for the respondent, referred to s. 213 of the Code of Civil Procedure, and contended that, as the appellants had not moved for a new trial, they were not entitled to question the findings of the jury or to apply for a new trial on this appeal. The judgment was right in law, and in its construction of the undisputed findings of the jury. The appellants broke and continuously refused to perform their contract; and on its true construction there was a repudiation: see *Withers* v. *Reynolds.* (5) If there was any point in relation thereto on which the appellants wished for a finding of the jury it was their duty to put it. Reference was also made to *Hall* v. *Conder.* (6)

Sanderson, K.C., replied.

1906
[*July* 24.

The judgment of their Lordships was delivered by

SIR ARTHUR WILSON. The controversy between the parties to this appeal arose out of a contract between them, under which

(1) (1884) 9 Q. B. D. 648; 9 App. Cas. 434.
(2) (1874) 43 L. J. (C.P.) 375.
(3) (1874) L. R. 9 C. P. 208.
(4) (1874) L. R. 10 C. P. 15, 22.
(5) (1831) 2 B. & Ad. 882.
(6) (1857) 2 C. B. (N.S.) 22.

J. C. 1906 GEORGE D. EMERY COMPANY v. WELLS.

Wells (respondent) was to cut timber upon land of, or over, which he had obtained a grant from the Government, and to deliver the timber to the company (appellant) in order that they might ship it at the bar of the Monkey River.

The contract was entered into on February 26, 1903, and was in the following terms:—

"An agreement made the 26th day of February, 1903, between D. S. Wells, of Monkey River, in the Colony of British Honduras, planter, of the one part, and Geo. D. Emery Company, of Boston, Mass., hardwood dealer, of the other part, witnesseth as follows:—

"The said D. S. Wells agrees to cut and deliver to the said Geo. D. Emery Company within the year 1903 200,000 feet of mahogany and cedar logs in the round, such logs to be in lengths of 12 feet 6 inches, 14 feet 6 inches, and 16 feet 6 inches, and to be sawn off at each end of the log, the said logs to be from 18 inches in diameter at the small end of the log, inside of the bark narrow way of the log, the measurement to be made according to Doyle's rule for log measurement in Scribner's Log Book of 1900, and be straight as reasonable and free from defects, such wood to be delivered to the said Geo. D. Emery Company or their agent at the bar of Monkey River.

"For the consideration above mentioned the said Geo. D. Emery Company agrees to pay to the said D. S. Wells the undermentioned rates per 1000 feet:—

"From 18 ins. to 24 ins. in diameter, $50.00 U.S. currency.
„ 25 ins. to 30 ins. in diameter, $55.00 U.S. currency.
„ 31 ins. to 40 ins. in diameter, $65.00 U.S. currency.
„ 41 ins. to 48 ins. in diameter, $80.00 U.S. currency.
„ 49 ins. and upwards in diameter, $87.50 U.S. currency.

"In the event of any of the logs being so large that they cannot be taken out in the round they may be squared.

"Should the said D. S. Wells be desirous of obtaining an advance on account of this contract the said Geo. D. Emery Company agrees to pay him 50 per cent. of the purchase price of the mahogany and 50 per cent. of the purchase price of the cedar so soon as the said D. S. Wells shall have the wood on the bank of the river and free from all encumbrances, to the

satisfaction of the said Geo. D. Emery Company ; such wood shall then be stamped by the said Geo. D. Emery Company, and shall be deemed to have been delivered to him, but the said D. S. Wells shall nevertheless be bound, when notified by the said Geo. D. Emery Company or their agent, to bring the wood to the said bar at his own cost, and should he neglect to do so the wood may be brought down to the said bar by the said Geo. D. Emery Company and the expense of bringing the same down shall be deducted from the balance due to the said D. S. Wells.

"It is hereby agreed that in the event of the death of the said D. S. Wells all wood cut and on the bank of the river on which the said Geo. D. Emery Company have made any advances to the said D. S. Wells, the said Geo. D. Emery Company is hereby empowered to bring said wood to the bar for shipment on their account, and any residue remaining after advances made by the said Geo. D. Emery Company to the said D. S. Wells have been paid, said residue to be paid by Geo. D. Emery Company to the heirs or assigns of the said D. S. Wells. Should such wood that is cut and on the bank of the river, however, not be sufficient to cover said advances then the said Geo. D. Emery Company shall have the right under this contract to cut and extract sufficient mahogany and cedar to liquidate the indebtedness of the said D. S. Wells to the said Geo. D. Emery Company.

"It is also hereby agreed that all mahogany and cedar on this body of land now granted to the said D. S. Wells by the Government of British Honduras is to be delivered to the said Geo. D. Emery Company and for which contracts shall be made annually for the amount to be delivered.

"In witness whereof the parties have hereunto set their hands the day and year first above written.

Witness (Sd.) "D. S. Wells,
(Sd.) "Geo. D. Emery Co.,
"per D. W. Buskirk."

"N.B.—In the event of the said D. S. Wells not being able to procure the necessary labour for the working of this contract in 1903 an extension will be given for deliveries of wood until

J. C. 1906

GEORGE D. EMERY COMPANY v. WELLS.

the said D. S. Wells can make satisfactory arrangements for labour.

(Sd.) "D. S. Wells,
(Sd.) "Geo. D. Emery Co.,
"per D. W. Buskirk."

As contemplated by the contract, the time for delivery of the 200,000 feet of timber was extended from 1903 to 1904.

By June, 1904, difficulties had developed between the parties, the main subject of dispute being as to the meaning of the words, "on the bank of the river," in the clause of the contract which entitled Wells to an advance of 50 per cent. of the purchase price so soon as the wood was in that position. A reference to the rough sketch, No. 126, exhibit E, makes the question intelligible. It shews that there are three branches of the Monkey River, which become joined at a certain point, thus forming the Swasey branch, and that somewhat lower down the river is joined by the Cockscomb Creek. The company contended that the "bank of the river" applied only to the main river after the junction of the three branches, to the exclusion of the banks of the branches and the banks of the creek; Wells contended that the words in question extended also to the branches and the creek.

Wells, as the jury have found, claimed to be credited with 50 per cent. of the price of the wood when it was on the bank, and in fact during a period commencing soon after the making of the contract the company did pay to him sums aggregating $7500, not expressly on account of the 50 per cent. advance, but at any rate on account of the contract, which perhaps comes to the same thing. The company insisted upon Wells taking the timber to the bar of the river and there handing it over. Other questions also arose between the parties which it is now unnecessary to consider. The facts are so far referred to only in order to make what follows intelligible. By the autumn of 1904 things had arrived at something like a deadlock.

On December 7, 1904, Wells commenced his action against the company. In his statement of claim he set out a number of circumstances from which he contended, amongst other things, that the company had repudiated the contract, and he claimed

damages accordingly. The company by their defence denied the plaintiff's case, alleged that the plaintiff had himself broken the contract by his failure to bring the timber to the bar of the river, and by way of counter-claim asked for damages. The case was tried before the learned Chief Justice and a special jury in June and July, 1905. At the close of the case no general verdict was taken, but the learned Chief Justice left sixteen specific questions to the jury, and received their answers. Those questions and answers, so far as they are now material, were as follows:—

"Question 1. Does the evidence raise any ambiguity in the contract as to the meaning of the words 'bank of the river' wherever they occur in the contract?—Yes.

"Question 2. If Yes, what do you find from the evidence these words to mean? Do they mean (*a*) the bank of the main river? or (*b*) do they mean any branch or creek of the river near to which the plaintiff was cutting mahogany and cedar under the contract, and which would contain enough water in ordinary floods to bring out the wood to the bar of the river? or (*c*) what do these words mean?—The bank of the river means (*b*) any branch or creek of the river near to which the plaintiff was cutting, &c.

"Question 6. Did the plaintiff, or did he not, intimate to the defendants or their agents, or any of them, that he desired them to credit him with 50 per cent. of the purchase price of the wood when it was on the bank of the river?—Yes; 5 to 2.

"Question 9. Was the delivery of the wood to the defendants complete under the contract, and did they accept the wood so delivered?—Yes.

"Question 11. Did the defendants, by sending the letter A 36 and the attached account to the plaintiff, intend to repudiate those parts of the contract dealing with the advance of 50 per cent. of the purchase-money of the wood?—No.

"Question 12. Did the plaintiff expressly, or by his conduct, lead the defendants to believe that he would not take the wood to the bar of Monkey River?—No.

"Question 13. What is the approximate number of superficial feet of mahogany and cedar which the plaintiff had on the bank

J. C. 1906 GEORGE D. EMERY COMPANY v. WELLS.

of the main river, the three forks or branches, and Cockscomb Creek in 1904? How much of the said wood was sound and of contract size?—886 logs, measuring, total 319,401 superficial feet. Sound wood 827 logs, measuring 302,294 superficial feet.

"Question 14. What is the approximate value (*a*) of all the above wood? (*b*) of the sound wood of contract size?—(*a*) $17,912.03; (*b*) $17,306.95.

"Question 15. What is the prospective damage which you find the plaintiff has suffered?—$2167.85."

The plaintiff subsequently moved the Court for judgment, and after cause had been shewn against the motion, the learned Chief Justice, on July 25, 1905, delivered his decision, directing judgment to be entered for the plaintiff for $11,974.80, and also in his favour on the counter-claim, with costs, and judgment was entered accordingly. Against that judgment the present appeal has been brought.

The learned counsel for the appellant, in opening the appeal, proceeded upon very broad ground. It was contended that questions had been left to the jury which ought to have been decided by the learned judge himself, that the jury had been misdirected, that evidence had been improperly admitted, and that as to certain findings of the jury, either there was no evidence to support them or they were against the weight of evidence. Such contentions as these, if well founded, could clearly only be ground for a new trial, and their Lordships' attention has been called to the enactment relating to new trials in force in the Colony of Honduras (Consolidated Laws of the Colony of British Honduras, Part VI., c. 13, s. 213), which says:—

"A party desirous of entering a judgment non obstante veredicto, or upon a point of law reserved, or upon any other grounds reserved at the trial, or of obtaining a new trial of any cause or matter on which a verdict has been found by a jury, or by a judge without a jury, must apply for the same to the Court by motion for an order calling upon the opposite party to shew cause at the expiration of eight days from the date of the order, or so soon after as the case can be heard, why a new trial should

not be directed, or why judgment should not be entered as aforesaid. Such motion shall be made within four days after the trial, or within such extended time as the Court may allow, or at any such time as the Court may determine upon application made immediately after the trial."

In the present case no application for a new trial was made to the Court in Honduras. The enactment just referred to is imperative, and their Lordships have no power to relax or dispense with it. The result is, that on the present appeal no contention directed to a new trial is open to the appellants; and this excludes all questions as to whether there was a miscarriage of the trial itself, all questions as to whether any point was wrongly left to the jury, as to misdirection, as to improper admission of evidence, and as to the correctness of the findings of the jury.

What does remain open to the appellant is whether, assuming the correctness of all that took place at the trial, and of the findings of the jury, the judgment subsequently delivered by the learned Chief Justice is justified by those findings. This of course greatly limits the scope of the present appeal.

The first of the questions thus remaining open to the appellant arises in this way. The finding of the jury in answer to the second question put to them unquestionably negatives the contention of the company that the words "bank of the river" in the contract were necessarily limited to the main river, to the exclusion of branches and creeks, and explained those words in a different sense. And their Lordships may add that, if and so far as there was a question of construction on the facts found, they do not differ from the finding of the jury. But it was said that there was no finding to the effect that the logs primarily in question in this case were in fact at the material time in positions falling within the definition laid down by the jury.

This is true, and it might have been a serious defect had it not been for the finding of the jury upon question No. 9. By their answer to that question the jury found that the delivery of the wood (that is to say, the wood primarily in question in this suit) to the defendants was complete under the contract, and that they

J. C.
1906
GEORGE D. EMERY COMPANY v. WELLS.

accepted the wood so delivered. That finding precludes the company, in this appeal, from raising any question as to whether they were bound under the contract to accept any part of the wood so delivered and accepted.

Another question raised was whether there was any sufficient finding by the jury of a breach of the contract on the part of the company. In their Lordships' opinion the answer of the jury to question 6 is a sufficient finding of a breach, and of the real breach complained of, which was a failure to pay the full 50 per cent. of the price of the logs.

Then it was contended that the learned judge was not justified in himself deciding that the breach of contract on the part of the company went to the root of the contract, so as to entitle Wells to treat the contract as repudiated, and that a finding of the jury on the point was necessary. No doubt, in many cases which can be imagined, such a question would probably be left to the jury. But where the question depends, as it does here, upon the construction of a written contract, their Lordships can see no reason why the judge should not decide it as he would any other question so arising. In the familiar case of *Withers* v. *Reynolds* (1), always cited when this class of question arises, the point was made the ground of a non-suit.

The remaining questions relate to damages. The first branch of the damages relates to the wood which the jury by their answer to the 9th question found to have been delivered to, and accepted by, the company, and which, by their answer to the 14th question, they valued at $17,306.95. The main objection to the damages so assessed, raised upon the present appeal, was that Wells was, by his contract, under an obligation to convey the wood to the bar of the river, notwithstanding the delivery and acceptance at the higher point, and that allowance ought to have been made for that by way of deduction in assessing damages. If that be so, it was a matter for evidence, and the company had every opportunity at the trial of producing such evidence and having it left to the jury. In its absence their Lordships have nothing before them from which they could say

(1) 2 B & Ad. 882.

that any allowance should be made on such ground. The $7500 which were advanced have been duly credited.

The second branch of the damages is what is called, in the judgment, prospective damages, entered in accordance with the answer of the jury to the 15th question. Those prospective damages relate to Wells' loss of profit to be earned in years subsequent to 1904, during the five years contemplated by the contract. The objection of the appellant was, that no such damages could be allowed at all on the ground that the contract was simply a contract for one year. The amount of the damages, if admissible at all, was not alleged to be excessive. The view of the learned Chief Justice was thus expressed: " Annual contracts were to be made for the amount to be delivered each year, and my construction of the agreement is, that however little or however much wood the defendants agreed to take in any particular year, during the continuance of the term, they were bound to make arrangements by which they would succeed in taking all the plaintiff's wood cut during the term of years."

Their Lordships agree with the learned Chief Justice as to the meaning of the contract, and therefore consider that the prospective damages were properly allowed.

Their Lordships will humbly advise His Majesty that this appeal should be dismissed.

The appellants will pay the costs.

Solicitors for appellants: *Norris, Atlens & Chapman.*

Solicitors for respondent: *Parker, Garrett, Holman & Howden.*

[PRIVY COUNCIL.]

J. C.* 1906

June 26, 27; *July* 25.

COMMISSIONER OF TAXES FOR NEW ZEALAND . . . . . } PLAINTIFF;

AND

EASTERN EXTENSION AUSTRALASIA AND CHINA TELEGRAPH COMPANY, LIMITED . . . . . } DEFENDANTS.

ON APPEAL FROM THE COURT OF NEW ZEALAND.

New Zealand Land and Income Assessment Act, No. 49 *of* 1900, *s.* 59—*Construction—Income derived from business—Business carried on in the Colony or Profits received.*

By s. 59 of the New Zealand Land and Income Assessment Act, No. 49 of 1900, taxable income derived from business includes profits derived from New Zealand as well as profits received in New Zealand.

The respondent company, with its head office in London, carried on the business of international telegraphy in New Zealand and at various places in Australia and elsewhere in accordance with the rules contained in the St. Petersburg Convention of 1875 and subsequent regulations.

In an action by the appellant to recover income tax (inter alia) on profits derived by the respondents, but not received in New Zealand, from transmitting messages beyond Australia, and over their cables other than those between New Zealand and the Australian Colonies:—

Held, that these were not profits derived from New Zealand, or from business done there, within the meaning of s. 59. There was no evidence of any contractual relation, express or implied, having been established in New Zealand, either with the New Zealand Government or with the senders of the telegrams, to carry the telegrams to their ultimate destination. Having regard to the terms of the convention and regulations and published conditions of the respondents' business, it was not shewn, and could not be implied, that the New Zealand Government contracted to do more than start the telegrams and then hand them over to the owners of the next stage.

Erichsen v. *Last*, (1881) 8 Q. B. D. 414, distinguished.

APPEAL from a judgment of the Court of Appeal (August 25, 1904), varying the judgment of Cooper J. (February 10, 1904).

The system of international telegraphy was during the period in question in this suit regulated by the St. Petersburg Convention of 1875, and certain international service regulations

* *Present:* THE EARL OF HALSBURY, LORD DAVEY, SIR ARTHUR WILSON, and SIR ALFRED WILLS.

annexed thereto at a conference in Budapest in 1896. The telegrams and payments, which form the subject-matter of this action, were worked and dealt with in accordance therewith. The course of the respondents' business is described in their Lordships' judgment.

The appellant by his statement of claim alleged in effect that the gross income received in and derived from New Zealand by the respondent company for the eleven months ending March 31, 1901, was 24,137*l.*, and that the net income in respect of which the respondent company was liable to pay income tax was 17,817*l.*, and he claimed the sum of 890*l.* 17*s.*, being income tax at the rate of 1*s.* in the pound on such net income of 17,817*l.*

The respondent company pleaded (inter alia) that the gross income received by it in New Zealand and derived by it from its business in the said Colony for the said period was 10,080*l.* only. Such sum of 10,080*l.*, it stated, was the aggregate amount paid by the New Zealand Government to the respondent company's bank account at Nelson during the said period in accordance with the practice or course of business between them.

In the action the appellant contended that by virtue of the Act of 1900 the Government were entitled to assess and charge the respondents with income tax, not only on the profits which it made in transmitting from Wakapuaka to La Perouse the telegraphic messages handed to it by the New Zealand Government at Wakapuaka, but also upon the profits which the respondent company made on any telegrams from New Zealand to places outside Australia which were handed to it by the Government of Western Australia at Roebuck Bay, or by the Government of South Australia at Port Darwin for transmission over the respondent company's cables from Roebuck Bay or Port Darwin.

The respondent company, at the hearing before the Court of Appeal, contended that it was only liable to be assessed and charged with income tax upon the profits which it made in transmitting from Wakapuaka to La Perouse the telegraphic messages which were handed to it by the New Zealand Government at Wakapuaka.

J. C.
1906
COMMISSIONER OF TAXES FOR NEW ZEALAND
v.
EASTERN EXTENSION AUSTRALASIA AND CHINA TELEGRAPH COMPANY, LIMITED.

Cooper J. gave judgment for the said sum of 890*l.* 17*s.*, with costs. The Court of Appeal disallowed the tax charged on income derived by the company for transmitting messages beyond La Perouse, and remitted the case to the Court below to ascertain what income tax was payable in respect of profits made only on telegrams transmitted between Wakapuaka and La Perouse.

Rufus Isaacs, *K.C.*, *W. J. Napier*, and *Northcote*, for the appellant, contended that this judgment was wrong. They referred to the Act of 1900, s. 3, s. 13, sub-s. 3, s. 14, sub-s. 2, ss. 51, 59 and 65, and contended that the whole of the net profits derived by the respondent company in respect of the transmission to their final destination of all telegrams received by them in New Zealand for transmission and sent by them from New Zealand must be taken into account. The whole of them are "profits derived from or received in New Zealand" from their business within the meaning of that Act. They contracted in New Zealand with the Government of New Zealand to transmit all telegrams handed to them by the New Zealand Government to their final destination. The contract so made contemplated the transmission of these telegrams over the respondents' cable from Australia to India. It was made with that Government, or alternatively with the sender of the telegram through the agency of that Government. All these telegrams and the profits arising therefrom came to the respondent company by reason of the business carried on by them in New Zealand and of the property owned by them in that Colony, viz., the shore end of their cable. It was contended that the telegrams originated in New Zealand; that the full payment therefor is wholly made by the sender in New Zealand; that that part of the money so paid which ultimately reached the hands of the respondent company is money received from New Zealand; and that the net profit so derived is "profit derived from New Zealand," and therefore taxable. Besides, the respondents' business as carried on in New Zealand is not merely the business of sending telegrams to Australia, but includes the business of sending telegrams to all parts of the world. It was also contended that, apart from

any contractual relationship between the company and the Government, profits derived by it from all telegrams received by it in New Zealand for transmission over sea are taxable. Reference was made to *Erichsen* v. *Last* (1); *Werle* v. *Colquhoun*. (2)

Sir R. Finlay, K.C., *Eldon Bankes, K.C.*, and *Bliss*, for the respondents, contended that by virtue of the Act of 1900 they were only liable to be assessed and charged with income tax upon the profits made by them in transmitting from Wakapuaka to La Perouse the telegraphic messages which were handed to them by the New Zealand Government at Wakapuaka. They denied that they were chargeable in respect of profits made on any telegrams from New Zealand to places outside Australia which were handed to it by the Government of Western Australia at Roebuck Bay or by the Government of South Australia at Port Darwin for transmission over the respondents' cables from those two points respectively. They contended that the words "profits derived from or received in New Zealand from business" are only applicable to profits from business actually carried on in New Zealand, or to profits from business carried on outside New Zealand but received in New Zealand. If those words include profits from business carried on outside New Zealand and not received in New Zealand, they must in that case be limited, on any reasonable view, to such profits as are derived in such business immediately from New Zealand. That is not the case with regard to the profits in question in this appeal. They denied that the New Zealand Government contracted as their agents with the senders of messages. There was no contract between that Government and the respondents that the messages should be transmitted from New Zealand to their destination. All messages sent or received by the States of New Zealand, New South Wales, South Australia, or Western Australia were sent or received in accordance with the St. Petersburg Convention. During the period in question there was no contract in writing between the Government and the respondents; there had been one, but it had been determined. They referred to *Commissioner of Taxes* v. *Kauri*

(1) 8 Q. B. D. 414. (2) (1888) 20 Q. B. D. 753.

J. C. 1906

COMMISSIONER OF TAXES FOR NEW ZEALAND v. EASTERN EXTENSION AUSTRALASIA AND CHINA TELEGRAPH COMPANY, LIMITED.

1906 July 25.

Timber Co. (1); *Commissioner of Taxes* v. *Kirk* (2); *San Paulo Brazilian Ry. Co.* v. *Carter*. (3)

Napier replied.

The judgment of their Lordships was delivered by

LORD DAVEY. This is an appeal from a judgment of the Court of Appeal of New Zealand varying the judgment pronounced by the Supreme Court in favour of the appellant. Stated shortly, the question involved in the appeal is whether the respondent company is liable to be assessed for income tax in respect of all the profits made by it in relation to the transmission of telegraphic messages from New Zealand to places outside the Australasian Colonies, or only upon so much of such profits as is attributable to the transmission of such messages over its cable between New Zealand and Australia.

The respondent company is an incorporated company, having its head office in London, but carrying on business at Wakapuaka, in the district of Nelson, in the Colony of New Zealand, and at various places in Australia and elsewhere, and is the owner of submarine cables from Wakapuaka to La Perouse, near Sydney, in the Colony of New South Wales, and from Port Darwin, in South Australia, and Roebuck Bay, in Western Australia, to Madras. It is also the owner of other submarine cables, and the business of the respondent company is to transmit telegraphic messages between various parts of the world.

The Act regulating the assessment of Income Tax in the Colony of New Zealand is the Land and Income Assessment Act No. 49 of 1900, the material sections of which for the present purpose are the following:—

"Section 51. Where the taxpayer is a company, its income derived from business shall . . . . be deemed to include all profits derived from or received in New Zealand from such business in each year ending at the close of the thirty-first day of March, including therein all profits falling within the definitions of 'income derived from business' and 'income derived from employment or emolument,' in sections fifty-nine and sixty

(1) (1904) 24 N. Z. L. R. 18, 26. (2) [1900] A. C. 588.
(3) [1896] A. C. 31.

hereof, ... and income tax shall be assessed and levied on all such income accordingly."

"Section 59. 'Income derived from business' includes, but without limiting the meaning of the words, the profits derived from or received in New Zealand by any taxpayer, in or out of New Zealand, in each year ending the thirty-first day of March from the following sources:"—(inter alia) "(1.) From any business."

"Section 65. For the purposes of this Act a taxpayer (whether a company or not) shall be deemed to have derived income although the same has not been actually paid to or received by him, but has been credited in account, or reinvested, or accumulated, or capitalized, or carried to any reserve, sinking, or insurance fund, however designated, or otherwise dealt with in his name or interest or on his behalf."

The telegraph lines in New Zealand belong to the Government, and no person other than the Government is allowed to receive a message for transmission to any place in or out of the Colony. The Government telegraphic station at Wakapuaka and the respondent company's station at that place are under one roof, and are connected by a wicket or internal window. The present claim relates to the period of eleven months ending March 31, 1901. During that period the ordinary course of business in transmission of telegrams from New Zealand to places beyond Australia was as follows: The Government received the message from the sender together with the entire charge (being at the rate of 5*s.* 2*d.* a word) and transmitted it over their own line to Wakapuaka, the charge for which was 1*d.* a word. It was there handed to the respondent company and transmitted by it to La Perouse (the charge for which was 3*d.* a word) and handed to the Government of New South Wales. The Government of New Zealand deducted 1*d.* and (by arrangement with the responden company) 3*d.*, and credited the New South Wales Governmen with the balance of 4*s.* 10*d.* New South Wales in its turn transmitted the message to Adelaide, the charge for which was 1*d.*, and credited the South Australian Government with the balance of 4*s.* 9*d.* The South Australian Government transmitted the message to Port Darwin (say), the charge for which was 7*d.*, and

J. C. 1906

COMMISSIONER OF TAXES FOR NEW ZEALAND v. EASTERN EXTENSION AUSTRALASIA AND CHINA TELEGRAPH COMPANY, LIMITED

credited the respondent company with the balance of 4*s.* 2*d.* The company sent the message over their cable to Madras, where the Indian Government took charge of it, receiving the balance of the charge. It is unnecessary to pursue the message further.

This course of business was in accordance with the rules contained in the St. Petersburg International Telegraphic Convention of 1875 and the regulations made by the contracting parties for carrying the convention into effect. By rules 2 and 3 of the Convention the parties to it undertake to adopt all necessary measures to ensure the secrecy and prompt despatch of the correspondence, but declare that they accept no responsibility on account of the service of international telegraphy. In the "conditions" under which telegrams are transmitted to places beyond the Colony made and published by the New Zealand Government it is declared that "No responsibility is accepted for any delay or errors in the transmission of telegrams nor for the non-transmission or non-delivery of telegrams from whatever cause arising."

The appellant seeks to charge the respondent company with income tax on the profits derived by it from transmitting messages from Port Darwin to Madras. No part of these profits was ever received by the respondent company in New Zealand. The only question, therefore, is whether they are profits derived from New Zealand within the meaning of s. 59 of the Act of 1900. The appellant maintains the affirmative on three alternative grounds—(1.) that the respondent company contracted in New Zealand with the New Zealand Government to carry the message to its ultimate destination; (2.) that the Government contracted with the sender to transmit the telegram to its destination as agent for and on behalf of the respondent company; and (3.) that the message was carried at any rate from Port Darwin or Roebuck Bay in performance of an obligation undertaken by the respondent company in New Zealand. There is no evidence to support the first suggestion. The Government did not even treat the respondent company as a "limitrophic State" within the meaning of the convention, and no part of the total charge was paid or credited to the respondent company by the New Zealand Government beyond the 3*d.* per word for transmission

to La Perouse. The second suggestion is equally lacking in foundation. Indeed, their Lordships, looking to the terms of the convention and regulations and the published conditions of the business, have great doubt whether the Government itself entered into any obligation to do more than start the telegram on its journey and hand it over to the owners of the next stage. This observation applies equally to the appellant's third mode of putting his case, but independently of any considerations of that kind their Lordships cannot find any evidence from which to infer or imply any such contract as suggested. In the result they think that the profits of transmitting the telegram from Port Darwin or Roebuck Bay were derived from South Australia or Western Australia, as the case might be, and not from New Zealand, or business done there.

The learned counsel for the appellant relied on the case of *Erichsen* v. *Last*. (1) The English Income Tax Act differs in its language from the New Zealand Act, which their Lordships have to construe, but it may be assumed that the principle on which that case was decided in the Court of Appeal is equally applicable to the New Zealand Act. The learned Chief Justice in his judgment in the present case quotes copious extracts from the judgments of the Master of the Rolls and the Lords Justices in *Erichsen* v. *Last* (1), and he sums up his remarks in the following passage, with which their Lordships agree:—

"It will be observed that in all these judgments the ratio decidendi is that the company has made contracts in the United Kingdom for the transmission of telegrams to their destination. If the company had received the full amount of the telegraph charge, less the cost of transmission from the office where it was received to Wakapuaka, and had undertaken with the New Zealand Government to transmit the message to its destination, then I should have been of opinion that the case of *Erichsen* v. *Last* (1) was directly in point, and that the tax was properly levied. But this is not what is done. The New Zealand Government only pay for the transmission to La Perouse, and they leave to the States of New South Wales and South Australia, or one of them, the making of the new arrangement between the Eastern

(1) 7 Q. B. D. 12; 8 Q. B. D. 414.

J. C. 1906

COMMISSIONER OF TAXES FOR NEW ZEALAND v. EASTERN EXTENSION AUSTRALASIA AND CHINA TELEGRAPH COMPANY, LIMITED.

Extension Company and the State for the transmission beyond Port Darwin, and the company is paid by the South Australian Government for what it does. This seems to me to distinguish this case from that of *Erichsen* v. *Last* (1), and, reading the words literally, as an Act making a charge or a tax upon an individual should be read, I cannot see how it can be said that the profits were derived from the business carried on in New Zealand."

Two agreements dated December 13, 1892, between the New Zealand Government, the Governments of certain Australian Colonies, and the respondent company were referred to by the learned judges in the Court of Appeal. These agreements had been determined, and were not in force during the period in question, but they were referred to as illustrating the course of business in international telegraphy. The appellant, however, referred to them at their Lordships' bar in support of his argument that there was a contractual relation between the respondent company and the New Zealand Government as to the transmission of messages over the respondent company's cables beyond Australia. If and so far as these agreements can be said to have added to or varied the proper inferences to be drawn as to the relations of the parties from the actual course of business and other circumstances, their Lordships think that, having been determined by the parties, they could not properly be used for such purpose. But their Lordships do not understand any of the agreements to have had that effect. The first agreement is between the New Zealand Government and the respondent company alone. It relates exclusively to messages transmitted over the company's cables connecting New Zealand and Australia, and has nothing to do with this case.

By the second agreement, which was made between the Australian Governments of the first part, the New Zealand Government of the second part, and the respondent company of the third part, the provisions of a previous agreement of March 31, 1891, made between the Australian Governments and the respondent company were adopted, with some variations as to rates, and the New Zealand Government became bound by, and had the benefit of, those provisions as varied, and became a

(1) 7 Q. B. D. 12; 8 Q. B. D. 414.

party to a guarantee thereby given by the Australian Governments to the respondent company. These agreements appear to their Lordships to relate only to the rates to be charged by the parties to them for their services in the transmission of through messages to places beyond Australia, and do not appear to have varied the mode in which that business was conducted on the basis of the convention. Both agreements were made in London, and the amount of the guarantee under the second agreement was payable in London.

Their Lordships will humbly advise His Majesty that the appeal be dismissed and the appellant will pay the costs of it.

J. C.
1906
COMMISSIONER OF TAXES FOR NEW ZEALAND *v.* EASTERN EXTENSION AUSTRALASIA AND CHINA TELEGRAPH COMPANY, LIMITED.

Solicitors for appellant: *Mackrell, Maton, Godlee & Quincey.*

Solicitors for respondents: *Bischoff, Dodgson, Coxe, Bompas & Bischoff.*

[PRIVY COUNCIL.]

LAPOINTE . . . . . PLAINTIFF;

AND

L'ASSOCIATION DE BIENFAISANCE ET DE RETRAITE DE LA POLICE DE MONTREAL . . . . . DEFENDANTS.

J. C.*
1906
July 6, 10, 27.

ON APPEAL FROM THE COURT OF KING'S BENCH FOR THE PROVINCE OF QUEBEC.

Police Pension Society—Judicial Duties of Directors—Rights of Members—Claim under the Rules by Policeman obliged to resign—Procedure on Inquiry.

The rules of the respondent police pension society provided that every application for a pension should be fully gone into by the board of directors, and in particular that any member entitled thereto, who is dismissed from the police force or is obliged to resign, shall have his case considered by the board and his right thereto determined by a majority.

On an application for a pension by the appellant, who had been obliged

---

* *Present:* LORD MACNAGHTEN, LORD DUNEDIN, LORD ATKINSON, SIR ARTHUR WILSON, and SIR HENRI ELZÉAR TASCHEREAU.

J. C.
1906
LAPOINTE
v.
L'ASSOCIATION DE BIENFAISANCE ET DE RETRAITE DE LA POLICE DE MONTRÉAL.

to resign, the board, without any judicial inquiry into the circumstances, resolved to refuse the claim, "seeing that he was obliged to tender his resignation":—

Held, in an action by the appellant in effect to compel a due administration of the pension fund, that this resolution was void and of no effect. The tender of resignation gave him the right to appeal to the board, and to have his claim as affected thereby duly considered and determined. It did not by itself forfeit rights acquired by length of service and regular contribution to the pension fund. Case remitted to the Superior Court, with declarations directed to secure to the appellant a due consideration and determination thereof by a differently constituted board.

APPEAL by special leave from a judgment of the Court of King's Bench (Montreal), reversing a judgment of the Superior Court, which ordered the inscription of the appellant on the list of pensioners of the respondent association entitled to an annual life rent of $600.

To the appellant's suit for a pension the defence was in effect that he had been obliged to resign, and that under the circumstances set out in their Lordships' judgment the board of directors rightly applied s. 45 of the respondents' by-laws in refusing to grant it.

An appeal from the Court of King's Bench to the Supreme Court of Canada was quashed for want of jurisdiction, and special leave to bring the present appeal was granted by Order in Council.

Lafleur, K.C., S. Beaudin, K.C., and *H. J. Elliott*, for the appellant, contended that the judgment of the Superior Court was right. By-law No. 45 did not give the board of directors arbitrary power to refuse the pension to which the appellant was entitled. It ought to have considered his case judicially, but no accusation was ever laid against the appellant, nor was he asked for any explanation or afforded any opportunity to defend himself from any secret accusation if such existed. His case was never considered and decided by the board, but referred by them to a committee, and afterwards to a general meeting of the society. The appellant had a vested right to his pension, and could not be deprived thereof arbitrarily, but only by action under the rules by the board exercising judicial functions, with due attention to

regularity and fairness. Reference was made to *Labouchere* v. *Earl of Wharncliffe* (1) and *Fisher* v. *Keane*. (2)

Macmaster, *K.C.*, *Leblanc*, *K.C.*, and *G. A. Campbell*, for the respondents, contended that when the appellant joined their society he subscribed to and accepted all their rules and by-laws, including No. 45, and thereby made it part of his contract with them. He thereby constituted the board of directors a board of arbitration between him and the society. Their decision accordingly was final and the appellant was bound by it, and this action does not lie.

Counsel for the appellant were not heard in reply.

1906
July 27.

The judgment of their Lordships was delivered by

LORD MACNAGHTEN. The appellant Lapointe, who was plaintiff in the action, was a member of the Montreal police force for twenty-nine years. He resigned on March 1, 1902. His resignation was accepted on the 8th of the same month. He was also a member of the respondent association, the Montreal Police Benevolent and Pension Society—a society incorporated by statute and governed by rules, published in both English and French, to which all members of the society are bound to conform. On retiring from the force Lapointe became qualified for a pension and entitled, subject to the rules of the society, to have his name placed on the pension roll.

The affairs of the society are managed by a board of directors composed of nine members. The superintendent of police is ex officio a member and chairman of the board. The other members are elected in accordance with the rules.

The material rules are the 23rd and the 45th. Rule 23 declares that "Every application for a pension, gratuity, or aid must come before the board, when the whole circumstances of the case will be fully gone into."

Rule 45 is in the following terms: "Any member entitled by length of service to a gratuity or pension who is dismissed from the force, or is obliged to resign, shall have his case considered by the board of directors, and his right to such gratuity or pension determined by a majority of the board."

(1) (1879) 13 Ch. D. 346. (2) (1878) 11 Ch. D. 353.

J. C.
1906
LAPOINTE
v.
L'ASSOCIATION DE BIENFAISANCE ET DE RETRAITE DE LA POLICE DE MONTRÉAL.

The French version differs slightly in language and structure. It may be translated as follows: "It shall be the duty of the committee"—meaning evidently the board—"to deliberate on the case of a member who, having a right to a gratuity or a pension, shall be dismissed from the police or obliged to give in his resignation. The majority of the committee shall decide whether such pension or gratuity should be accorded to him."

Two questions were debated at the Bar—(1.) whether Lapointe was "obliged to resign" within the meaning of rule 45, and (2.) whether his case was fully considered and determined by the board.

On the first question their Lordships have come to the conclusion that Lapointe must be treated as having been "obliged to resign."

In February, 1902, he was suspended, and an inquiry into the circumstances of his suspension was about to be held. Then he sent in his resignation. It was accepted by the authorities, who thereupon withdrew all charges against him. It appears that at the time he felt himself much embarrassed by a pledge which he had given when he got into trouble on a former occasion, to the effect that, if he should again incur the censure of his superiors, he would save all further trouble by resigning. There can be no doubt that he was under the apprehension that he might fare worse if an inquiry were held.

Then comes the question whether his case was fairly dealt with by the board.

The conduct of the board was most extraordinary. They first appointed a committee of four from their own body to investigate the reason of Lapointe's resignation. There would have been no objection to this course if the committee had been deputed to consider and report whether or not there was a prima facie case for inquiry. But what the committee did was to listen to all sorts of stories about Lapointe's past history, and rake up everything that was against him during his connection with the force. Then, without telling Lapointe what the charges against him were, or giving him any opportunity of defending himself, they advised the board that the pension should be refused. Thereupon the board abnegated their judicial duties

altogether. They summoned a general meeting of the members, and submitted a question, which they were bound to determine themselves, to a popular vote. The meeting was held on April 26, 1892, when by a large majority of the members present it was resolved that Lapointe's name should not be entered on the pension roll of the society.

The whole of these proceedings were irregular, contrary to the rules of the society, and above all contrary to the elementary principles of justice. And the position of the board was certainly not improved by a formal resolution stating solemnly, what was contrary to the truth, that after having inquired into the facts and circumstances which brought about Lapointe's resignation, and having deliberated upon his claim, the board "decides that the pension on which he claims be refused, seeing that he was obliged to tender his resignation." The respondents in their printed case actually rely on this resolution as concluding the whole matter, on the ground that, being certified by both the president and secretary of the society, its contents under the charter of the society "have to be accepted as fully proven."

It is obvious that the so-called determination of the board is void and of no effect.

It is hardly necessary to cite any authority on a point so plain. The learned counsel for the appellant referred to two well-known club cases before Sir George Jessel M.R., *Fisher* v. *Keane* (1) and *Labouchere* v. *Earl of Wharncliffe.* (2) It may be worth while to mention a later case before the same learned judge, in which he refers to the case of *Wood* v. *Woad* (3), in the Exchequer, and expresses regret that he was not acquainted with that case when those club cases were decided: see *Russell* v. *Russell.* (4)

"It contains," he says (5), "a very valuable statement by the Lord Chief Baron as to his view of the mode of administering justice by persons other than judges who have judicial functions to perform which I should have been very glad to have had before me on both those club cases that I recently heard, namely, the case of *Fisher* v. *Keane* (1) and the case of

(1) 11 Ch. D. 353.
(2) 13 Ch. D. 346.
(3) (1874) L. R. 9 Ex. 190.
(4) (1880) 14 Ch. D. 471.
(5) 14 Ch. D. at p. 478.

J. C. 1906 LAPOINTE v. L'ASSOCIATION DE BIENFAISANCE ET DE RETRAITE DE LA POLICE DE MONTRÉAL.

Labouchere v. *Earl of Wharncliffe*. (1) The passage I mean is this, referring to a committee: 'They are bound in the exercise of their functions by the rule expressed in the maxim "Audi alteram partem," that no man should be condemned to consequences resulting from alleged misconduct unheard, and without having the opportunity of making his defence. This rule is not confined to the conduct of strictly legal tribunals, but is applicable to every tribunal or body of persons invested with authority to adjudicate upon matters involving civil consequences to individuals.'"

Then the Master of the Rolls says: "I am very glad to find that that eminent judge has arrived at the same conclusion which I arrived at independently, but I should have been still more glad had I been able to fortify my conclusion by citing this, which I may call a most admirably worded judgment."

Now what was the duty of the board when Lapointe's claim was brought before them? What powers had they under the rules? If one compares the two versions, the French and the English, it is clear, on the one hand, that in the case of a member dismissed or obliged to resign the board have to determine whether the pension to which he is prima facie entitled should be accorded to him. But, on the other hand, it is equally clear that the appeal to the board is allowed to a member in order to prevent his case being held concluded by the mere fact of dismissal or forced resignation. It is not enough to find that the member was obliged to resign. The board of directors thought that finding of itself conclusive; so did the Court of Appeal. But that is the very circumstance which gives the member the right of appeal to the board. The board have to inquire into the circumstances of the dismissal or forced resignation. It is not open to them to review the past career of a member who claims a pension, and forfeit rights acquired by length of service and regular contribution to the fund, on the ground that faults which his employers have condoned or overlooked are, in their judgment, so grave as to justify them in punishing him by inflicting the extreme penalty of forfeiture. The board of directors must bear in mind that they are judges, not inquisitors.

(1) 13 Ch. D. 346.

So far the case seems to be simple enough. What remains is not so easy. Their Lordships have anxiously considered what order ought to be made now under the circumstances of the case. The action in substance, though not in form, is an action to administer the trusts of the pension fund, and to compel the trustees—that is, the board of directors—to administer those trusts in Lapointe's case in a proper and legal manner. The board before whom Lapointe's case came have acted in a manner so grossly unfair and improper that their Lordships could not allow the case to go again before the same tribunal. Understanding, however, that the members of the tribunal will not be the same, as the board is now composed of new members, their Lordships think that so extreme a measure is not required. At the same time, they think that the action ought to be retained in the Superior Court and that the Court ought to keep its hand over the future proceedings of the board of directors in Lapointe's case.

Their Lordships think that the purposes of justice will be met by an order to the following effect:—

Declare that in the events which happened the appellant Lapointe ought to be considered as having been obliged to resign within the meaning of rule 45.

Declare that the proceedings of the board in Lapointe's case were not a due consideration and determination of the matter before them as required by rule 45, and that the said proceedings were null and void.

Discharge the order of the King's Bench and, except as to costs, the order of the Superior Court.

Remit the action to the Superior Court.

Order the respondents to pay the costs of the appeal to the Court of King's Bench.

Declare that unless the board of directors forthwith or within such time as shall be allowed by the Superior Court proceed duly to consider and determine the claim of the appellant to a pension, the appellant will be entitled to have his name inscribed on the pension roll of the society.

Liberty for the appellant and the respondents and the board of directors respectively to apply to the Superior Court as to

J. C. 1906 — LAPOINTE v. L'ASSOCIATION DE BIENFAISANCE ET DE RETRAITE DE LA POLICE DE MONTRÉAL.

the conduct of any proceedings which may be taken in reference to the consideration and determination of the appellant's claim to a pension, the composition of the board of directors summoned to consider and determine the question, and as to subsequent costs, and generally as to any matter incidental to or consequential upon this order.

Their Lordships will humbly advise His Majesty that an order ought to be made to the effect of the above minutes.

Their Lordships regret that the costs of the appellant will fall upon the fund, and that they have no means of throwing these costs on the persons who are really to blame.

The respondents will pay the costs of the appeal.

Solicitors for appellant: *Blake & Redden.*

Solicitors for respondents: *Lawrence Jones & Co.*

[PRIVY COUNCIL.]

J. C.* 1906 — *July* 6, 27.

ATTORNEY-GENERAL FOR THE DOMINION OF CANADA . . . . . } APPELLANT;

AND

EVERETT E. CAIN . . . . . RESPONDENT.

ATTORNEY-GENERAL FOR THE DOMINION OF CANADA . . . . . } APPELLANT;

AND

GILHULA . . . . . RESPONDENT.

ON APPEAL FROM THE HIGH COURT (KING'S BENCH) OF ONTARIO.

CONSOLIDATED APPEALS.

Power of Dominion Parliament—Validity of Dominion Act 60 *&* 61 *Vict. c.* 11, *s.* 6, *amended by* 1 *Edw.* 7, *c.* 13—*Power to expel and deport Aliens.*

Held, that s. 6 of the Dominion statute 60 & 61 Vict. c. 11, as amended by 1 Edw. 7, c. 13, s. 13, is intra vires of the Dominion Parliament.

The Crown undoubtedly possessed the power to expel an alien from

---

* *Present:* LORD MACNAGHTEN, LORD DUNEDIN, LORD ATKINSON, SIR ARTHUR WILSON, and SIR HENRI ELZÉAR TASCHEREAU.

the Dominion of Canada, or to deport him to the country whence he entered it. The above Act, assented to by the Crown, delegated that power to the Dominion Government, which includes and authorizes them to impose such extra-territorial constraint as is necessary to execute the power.

APPEAL from orders made by Anglin J. on June 17, 1905, discharging the respondents from custody. The question decided was whether s. 6 of Dominion Act 60 & 61 Vict. c. 11, as amended by 61 Vict. c. 2 and 1 Edw. 7, c. 13, is ultra or intra vires of the Dominion Parliament.

On May 23, 1905, the appellant issued two warrants under these Acts to take the respondents, then residing in the province of Ontario, and return them to the United States of America. On being arrested the respondents were discharged on a writ of habeas corpus solely on the ground that the above Acts were ultra vires. Anglin J. held that the Parliament of Canada had no power to pass s. 6 of the Act in question. His view was that the use of the words "returned to" in s. 6 implied the exercise of constraining force outside the territorial limits of Canada, and that no colonial Legislature had power to enact legislation to be actively enforced beyond the boundaries of the Colony; and accordingly he held that s. 6 was ultra vires.

Newcombe, K.C., and *Shepley, K.C.*, for the appellant, contended that the statutes in question were intra vires of the Dominion Parliament, as being laws for the peace, order, and good government of Canada. They were enacted in the execution of that Parliament's enumerated powers with regard to—(*a*) the regulation of trade and commerce, (*b*) naturalization and aliens: see British North America Act, 1867, s. 91; and also 28 & 29 Vict. c. 63. Reference was made to *Riel* v. *Reg.* (1); *Hodge* v. *Reg.* (2); *In re Criminal Code Sections relating to Bigamy* (3); *Reg.* v. *Brierly.* (4)

J. A. Robinson and *Duncan*, for the respondents, contended that the Court below was right in holding the statutes to be ultra vires for the reasons assigned, viz., that they involved an

(1) (1885) 10 App. Cas. 675, 678.
(2) (1883) 9 App. Cas. 117.
(3) (1897) 27 Sup. Ct. Can. Rep. 461, 481, 483.
(4) (1887) 14 Ont. Rep. 525, 531, 533.

J. C.
1906
ATTORNEY-GENERAL FOR CANADA v. CAIN.
THE SAME v. GILHULA.
1906
July 27.

assumption of extra-territorial jurisdiction. The constraining force of the officer acting under the Attorney-General's warrant cannot cease the moment the respondents are outside the Dominion, for they are directed to be "returned to" the United States, which involves, or may involve, the application of force outside the Dominion.

The judgment of their Lordships was delivered by

LORD ATKINSON. The question for decision in this case is whether s. 6 of the Dominion statute 60 & 61 Vict. c. 11 (styled in the respondents' case "The Alien Labour Act"), as amended by 1 Edw. 7, c. 13, s. 13, is or is not ultra vires of the Dominion Legislature.

In the events which have happened the question has in this instance become more or less an academic one, inasmuch as the two persons arrested under the Attorney-General's warrant granted under the authority of s. 6 were on June 17, 1905, discharged from custody by order of Anglin J., and, a year having therefore elapsed since the date of their entry into Canada, they cannot be re-arrested.

Sect. 9 of 60 & 61 Vict. c. 11 has been amended by 61 Vict. c. 2, and ss. 1, 6 and 9 of the Alien Labour Act, as amended, are in the terms following:

"(1.) From and after the passing of this Act it shall be unlawful for any person, company, partnership or corporation, in any manner to prepay the transportation, or in any way to assist or encourage the importation or immigration of any alien or foreigner into Canada, under contract or agreement, parole or special, express or implied, made previous to the importation of such alien or foreigner, to perform labour or service of any kind in Canada."

"(6.) The Attorney-General of Canada, in case he shall be satisfied that an immigrant has been allowed to land in Canada contrary to the prohibition of this Act, may cause such immigrant, within the period of one year after landing or entry, to be taken into custody and returned to the country whence he came, at the expense of the owner of the importing vessel, or, if he entered from an adjoining country, at the expense of the person,

partnership, company, or corporation violating s. 1 of this Act."

"(9.) This Act shall apply only to the importation or immigration of such persons as reside in or are citizens of such foreign countries as have enacted and retained in force, or as enact and retain in force, laws or ordinances applying to Canada, of a character similar to this Act."

The validity of s. 6 was impeached on several grounds, and was held to transcend the powers of the Dominion Parliament, inasmuch as it purported to authorize the Attorney-General or his delegate to deprive persons against whom it was to be enforced of their liberty without the territorial limits of Canada, and upon this point alone the decision of the case turned. It was conceded in argument before their Lordships, on the principle of law laid down by this Board in the case of *MacLeod* v. *Attorney-General for New South Wales* (1), that the statute must, if possible, be construed as merely intending to authorize the deportation of the alien across the seas to the country whence he came if he was imported into Canada by sea, or if he entered from an adjoining country, to authorize his expulsion from Canada across the Canadian frontier into that adjoining country. The judgment of the learned judge was, in effect, based upon the practical impossibility of expelling an alien from Canada into an adjoining country without such an exercise of extra-territorial constraint of his person by the Canadian officer as the Dominion Parliament could not authorize. No special significance was attached to the word "return." The reasoning of the judgment would apply with equal force if the word used had been "expel" or "deport" instead of "return."

In 1763 Canada and all its dependencies, with the sovereignty, property, and possession, and all other rights which had at any time been held or acquired by the Crown of France, were ceded to Great Britain: *St. Catherine's Milling and Lumber Co.* v. *Reg.* (2) Upon that event the Crown of England became possessed of all legislative and executive powers within the country so ceded to it, and, save so far as it has since parted with these powers by legislation, royal proclamation, or voluntary grant, it

(1) [1891] A. C. 455, at p. 459. (2) (1888) 14 App. Cas. 46, at p. 53.

J. C. 1906 — ATTORNEY-GENERAL FOR CANADA v. CAIN. THE SAME v. GILHULA.

is still possessed of them. One of the rights possessed by the supreme power in every State is the right to refuse to permit an alien to enter that State, to annex what conditions it pleases to the permission to enter it, and to expel or deport from the State, at pleasure, even a friendly alien, especially if it considers his presence in the State opposed to its peace, order, and good government, or to its social or material interests: Vattel, Law of Nations, book 1, s. 231; book 2, s. 125. The Imperial Government might delegate those powers to the governor or the Government of one of the Colonies, either by royal proclamation which has the force of a statute—*Campbell* v. *Hall* (1)—or by a statute of the Imperial Parliament, or by the statute of a local Parliament to which the Crown has assented. If this delegation has taken place, the depositary or depositaries of the executive and legislative powers and authority of the Crown can exercise those powers and that authority to the extent delegated as effectively as the Crown could itself have exercised them. The following cases establish these propositions: *In re Adam* (2); *Donegani* v. *Donegani* (3); *Cameron* v. *Kyte* (4); *Jephson* v. *Riera*. (5) But as it is conceded that by the law of nations the supreme power in every State has the right to make laws for the exclusion or expulsion of aliens, and to enforce those laws, it necessarily follows that the State has the power to do those things which must be done in the very act of expulsion, if the right to expel is to be exercised effectively at all, notwithstanding the fact that constraint upon the person of the alien outside the boundaries of the State or the commission of a trespass by the State officer on the territories of its neighbour in the manner pointed out by Anglin J. in his judgment should thereby result. Accordingly it was in *In re Adam* (2) definitely decided that the Crown had power to remove a foreigner by force from the island of Mauritius, though, of course, the removal in that case would necessarily involve an imprisonment of the alien outside British territory, in the ship on board of which he would be put while it traversed the high seas.

(1) (1774) 1 Cowper, 204.
(2) (1837) 1 Moo. P. C. 460, at pp. 472-6.
(3) (1835) 3 Knapp, 63, at p. 88
(4) (1835) 3 Knapp, 332, at p. 343.
(5) (1835) 3 Knapp. 130.

The question, therefore, for decision in this case resolves itself into this: Has the Act 60 & 61 Vict. c. 11, assented to by the Crown, clothed the Dominion Government with the power the Crown itself theretofore undoubtedly possessed to expel an alien from the Dominion, or to deport him to the country whence he entered the Dominion? If it has, then the fact that extra-territorial constraint must necessarily be exercised in effecting the expulsion cannot invalidate the warrant directing expulsion issued under the provisions of the statute which authorizes the expulsion.

It has already been decided in *Musgrove* v. *Chun Teeong Toy* (1) that the Government of the Colony of Victoria, by virtue of the powers with which it was invested to make laws for the peace, order, and good government of the Colony, had authority to pass a law preventing aliens from entering the Colony of Victoria. On the authority of this case s. 1 of the above-mentioned statute would be intra vires of the Dominion Parliament. The enforcement of the provisions of this section no doubt would not involve extra-territorial constraint, but it would involve the exercise of sovereign powers closely allied to the power of expulsion and based on the same principles. The power of expulsion is in truth but the complement of the power of exclusion. If entry be prohibited it would seem to follow that the Government which has the power to exclude should have the power to expel the alien who enters in opposition to its laws. In *Hodge* v. *Reg.* (2) it was decided that a colonial Legislature has within the limits prescribed by the statute which created it "an authority as plenary and as ample . . . . as the Imperial Parliament in the plenitude of its power possessed and could bestow." If, therefore, power to expel aliens who had entered Canada against the laws of the Dominion was by this statute given to the Government of the Dominion, as their Lordships think it was, it necessarily follows that the statute has also given them power to impose that extra-territorial constraint which is necessary to enable them to expel those aliens from their borders to the same extent as the Imperial Government could itself have imposed the constraint for a similar purpose had the statute never been passed.

(1) [1891] A. C. 272. (2) 9 App. Cas. 117.

J. C. 1906 — ATTORNEY-GENERAL FOR CANADA v. CAIN. THE SAME v. GILHULA.

Their Lordships therefore think that the decision of Anglin J. was wrong, and that the appeal should be allowed, and will so humbly advise His Majesty.

Having regard to the arrangement as to costs made with the Attorney-General at the hearing of the petition for special leave to appeal, and to all the circumstances of the case, their Lordships direct the appellant to pay the costs of the respondents as between solicitor and client.

Solicitors for appellant: *Charles Russell & Co.*
Solicitors for respondents: *Blake & Redden.*

[PRIVY COUNCIL.]

J. C.* 1906 — *July* 27.

WILFLEY ORE CONCENTRATOR SYNDICATE, LIMITED . . . . . } PLAINTIFFS;

AND

N. GUTHRIDGE, LIMITED . . . . . DEFENDANTS.

ON APPEAL FROM THE HIGH COURT OF AUSTRALIA.

Practice—Special Leave to Appeal—Decree of High Court of Australia.

Where on a petition of special leave to appeal from the High Court of Australia it appeared that the law as laid down by that Court could not be objected to:—

Held, that the question of the application of that law to the particular case involving simply the construction of a document, however substantial as between the parties, was not one of public importance, and that there was no sufficient ground shewn for granting the petition.

THIS was a petition by the appellants for special leave to appeal from a judgment of the High Court dated March 20, 1906. It stated that Hood J., in the Supreme Court of Victoria, had found that the respondents were infringing the petitioners' letters patent for an invention entitled "improvements in ore concentrators," and decreed an injunction and damages; that the High Court had reversed this decree, holding that the said letters patent had been anticipated by a publication in a magazine or newspaper known as the *Engineering and Mining Journal of New*

* *Present:* LORD DAVEY, SIR ARTHUR WILSON, and SIR ALFRED WILLS.

York dated February 13, 1897, which was alleged to contain a description of the invention the subject-matter of the action. It submitted that the High Court was wrong in disregarding the evidence given by the petitioners and their witnesses that the persons to whom such anticipation would be addressed could not therefrom make or manufacture a concentrating table substantially identical with that of the petitioners' infringement, that upon the construction of the alleged anticipation the Court should have determined that there was no clear or sufficiently clear indication of the form of table to be made nor of the method of use thereof.

T. Terrell, K.C., and *Hume*, for the petitioners, contended that the case was one of substantial public importance within the principles laid down in *Prince* v. *Gagnon*. (1) The invention was one of very great importance, being for a concentrating table for separating metallic bodies from the earthy gangue with which they are mixed, which tables are now in very large use all over the world. They are considered to be amongst the most valuable concentrating tables at present known. Though the High Court's decree did not revoke the letters patent, the petitioners were practically deprived of the whole property in their very valuable patent, since no other action in Australia for infringement could succeed in face of that decree.

Northcote, for the respondent, was not heard.

The judgment of their Lordships was delivered by

LORD DAVEY. Their Lordships have very carefully considered this petition, and have had an opportunity of considering the arguments by Mr. Terrell in support of it. They have also looked through the judgment of the learned Chief Justice in the High Court, and they see no fault to find with the law as there laid down. Whether it was rightly applied to the particular case is, of course, another question, but the law as laid down seems to their Lordships to be in entire accordance with the judgment of the House of Lords in the case of *The Anglo-American Brush Electric Light Corporation* v. *King, Brown & Co.* (2) Both the judgments of Lord Halsbury (then

(1) (1882) 8 App. Cas. 103. (2) [1892] A. C. 367.

J. C. 1906

WILFLEY ORE CONCENTRATOR SYNDICATE, LIMITED v. N. GUTHRIDGE, LIMITED.

Lord Chancellor) and of Lord Watson expressly lay down that the specification is not required to contain "explanations or directions which would enable a workman of ordinary skill to construct" the patented invention. All that is required is that the specification of the patentee should "convey to men of science and employers of labour information which will enable them, without any exercise of inventive ingenuity, to understand his invention and to give a workman the specific directions which he failed to communicate." Therefore the construction of the document was, as the Chief Justice says, a matter for the Court, and the Court put its construction upon it, and held that it did disclose the invention in a sufficient way to enable a mining mechanician, or a mining engineer, to give the necessary directions to the skilled workmen who were to make the machine in accordance with it. It appears, therefore, to their Lordships that there is no question of law upon which the judgment of the learned Chief Justice can be objected to. It is a question of great importance no doubt, but a mere question concerning the value of the patent to the parties themselves, or, in other words, it is a matter of private right, and not one involving any question of public importance.

Mr. Terrell said quite truly that this Board had laid down that, in considering the question of whether leave to appeal should be given from the High Court of Australia, it would act upon the same principles on which it has been in the habit of acting on similar applications for leave to appeal from the Supreme Court of Canada, and he referred to the case of *Prince* v. *Gagnon* (1), in which Lord Fitzgerald specified certain circumstances under which the Board would be disposed to advise an exercise of the prerogative; but the case of *Prince* v. *Gagnon* (1) was commented upon by Lord Watson in the well-known case of *La Cité de Montréal* v. *Les Ecclésiastiques du Séminaire de St. Sulpice de Montréal* (2) in the following words: "It is the duty of their Lordships to advise Her Majesty in the exercise of her prerogative, and in the discharge of that duty they are bound to apply their judicial discretion to the particular facts and circumstances of each case as presented to them. In forming

(1) 8 App. Cas. 103. (2) (1889) 14 App. Cas. 660, at p. 662.

an opinion as to the propriety of allowing an appeal, they must necessarily rely to a very great extent upon the statements contained in the petition with regard to the import and effect of the judgment complained of, and the reasons therein alleged for treating it as an exceptional one, and permitting it to be brought under review. Experience has shewn that great caution is required in accepting these reasons when they are not fully substantiated, or do not appear to be prima facie established by reference to the petitioner's statement of the main facts of the case, and the questions of law to which these give rise. Cases vary so widely in their circumstances that the principles upon which an appeal ought to be allowed do not admit of anything approaching to exhaustive definition. No rule can be laid down which would not necessarily be subject to future qualification, and an attempt to formulate any such rule might therefore prove misleading. In some cases, as in *Prince* v. *Gagnon* (1), their Lordships have had occasion to indicate certain particulars the absence of which will have a strong influence in inducing them to advise that leave should not be given; but it by no means follows that leave will be recommended in all cases in which these features occur. A case may be of a substantial character, may involve matter of great public interest, and may raise an important question of law, and yet the judgment from which leave to appeal is sought may appear to be plainly right, or at least to be unattended with sufficient doubt to justify their Lordships in advising Her Majesty to grant leave to appeal."

The present case is said, no doubt, to be of a very substantial character; but in the opinion of their Lordships that is not a sufficient ground to induce them to recommend His Majesty to give leave to appeal from the decision of the High Court of Australia. They will, therefore, humbly advise His Majesty that the petition ought to be dismissed. The petitioners must pay the costs of the petition.

Solicitors for appellants: *Greenip, Snell & Co.*

Solicitors for respondents: *Murray, Hutchins, Stirling & Murray.*

(1) 8 App. Cas. 103.

[PRIVY COUNCIL.]

J. C.*
1906
July 4, 5, 6, 27; *Aug.* 2.

ATTORNEY-GENERAL OF BRITISH COLUMBIA . . . . . } PLAINTIFF;

AND

ATTORNEY-GENERAL OF CANADA . . DEFENDANT.

ON APPEAL FROM THE SUPREME COURT OF BRITISH COLUMBIA.

Land in British Columbia—Military Reserve—Title of the Dominion—Transfer by Imperial Government—British North America Act, 1867, *ss.* 108, 117.

The land in suit, called Deadman's Island, was de facto a "reserve" by the Government of British Columbia under paragraph 3 of the Proclamation of 1859, and according to the evidence a military reserve:—

Held, that it remained Imperial property at the time of the British North America Act, 1867, and was transferred to the Dominion by special grant dated March 27, 1884. It did not, therefore, fall to the Colony in virtue of s. 117 of the Act, nor to the Dominion in virtue of s. 108.

APPEAL from a judgment of the Full Court of the Supreme Court of British Columbia (July 29, 1904), reversing by a majority the judgment (September 7, 1901) of Martin J.

The action was brought by the appellant to restrain one Ludgate, the lessee from the Minister of Militia and Defence for the Dominion of the land in suit, situated in British Columbia, from trespassing thereon, and for a declaration that the title thereto was in the Crown on behalf of the province. The respondent was added as a defendant, and contended that the title thereto was in the Crown on behalf of the Dominion, the land having been reserved for the Imperial Government, and in that case having passed to the Dominion either by transfer from the Imperial Government or under the Act of 1867. Martin J. decided in favour of the appellant, the Full Court in favour of the respondent.

Sir R. Finlay, K.C., *Davis, K.C.*, and *C. A. Russell, K.C.*, for the appellant, contended that there was no sufficient evidence

* *Present:* LORD MACNAGHTEN, LORD DUNEDIN, LORD ATKINSON, SIR ARTHUR WILSON, and SIR HENRI ELZÉAR TASCHEREAU.

that the island had ever been appropriated to military purposes by competent authority or at all, or that the beneficial ownership thereof was ever vested in the Imperial Government for those purposes. Otherwise its surrender by that Government did not transfer it to the Dominion, but restored it to the province. There was, moreover, no evidence that at the time when British Columbia was admitted to the Union the island was "land set apart for general public purposes" within the meaning of the Third Schedule (item 10) of the Act of 1867 and became the property of Canada under s. 108. Under s. 117 it belonged to the province.

Sir E. Carson, K.C., Newcombe, K.C., Frank Russell, and *H. J. Duncan,* for the respondent, contended that on the evidence the island was, and continued to be, a military reserve, which must be presumed or was proved to have been validly and effectually made. Military reserves in Canada are vested in the Crown on behalf of the Dominion either by transfer from the Imperial Government or under the Act of 1867. They referred to an Imperial despatch of March 27, 1884, and to the Act of 1867, s. 108, Sched. 3 (10.).

C. A. Russell, K.C., replied.

Their Lordships reported on July 27 that the appeal should be dismissed.

The reasons for the report were delivered by

1906
Aug. 2.

Lord Dunedin. The question here to be decided is as to the property of a small island called Deadman's Island, lying near the entrance to Burrard Inlet in the harbour of Vancouver. It is admitted that no private individual has a right of property thereto, and the competition is as to whether the property of the Crown is here held for behoof of the Province of British Columbia, within whose territorial bounds it is situate, or for behoof of the Dominion of Canada.

The island in question lies about 130 yards from the adjacent peninsula—from which, indeed, it is only separated at certain states of the tide—which is commonly known as Stanley Park. From its physical configuration, and from other circumstances afterwards to be mentioned, their Lordships think that it is

J. C. 1906 — ATTORNEY-GENERAL OF BRITISH COLUMBIA v. ATTORNEY-GENERAL OF CANADA.

impossible to consider the history of the island except in conjunction with the history of the land of which it truly forms a part.

Now Stanley Park is a tract of land forming a peninsula at the entrance of Burrard Inlet, known in the older maps as the First Narrows, and is presently leased or otherwise demised as a park for the city of Vancouver. It might have been expected that evidence would have been led as to who were the authors of the title under which the city of Vancouver has possession. None such, however, was led, and, as learned counsel could not agree as to any statement on the matter, their Lordships have not thought it right to make any assumption thereupon. It is, however, common ground between the parties, and, if not categorically stated, at least transpires through all the evidence that Stanley Park and Deadman's Island have never been given in title to a private person, but have ever since the initiation of government been treated as a "reserve."

At this point an explanation seems necessary as to the import of the word "reserve," and it will, it is thought, be found that it is here that the opposing contentions of the parties really emerge.

There have been produced in the case a very interesting set of letters, despatches, and maps, which although necessarily imperfect in detail, yet provide a clear picture of the early land history of the Colony. Matters had begun by the indiscriminate squatting of adventurous settlers in a wild country. The initiation of the reign of law may be taken to date from the advent of Governor Douglas in 1858. By an Act of Parliament passed in that year British Columbia was erected into a separate territory, and power was given to Her Majesty by Order in Council to appoint a governor and make such provisions for the laws and administration of the new Colony as to her should seem fit.

Accordingly Sir James Douglas was in 1858 appointed governor by letters patent, and an Order in Council was made defining his powers and duties. As to his powers, it may be said at once that they were absolutely autocratic; he represented the Crown in every particular, and was, in fact, the law. At the

same time careful despatches were sent to him by the Colonial Minister of the day laying down in explicit terms the methods of administration which it was desired he should follow.

One of the earliest subjects to engage the attention of the home Government and the governor was the question of the giving out of land to settlers. In order to assist the governor in these matters a party of Royal Engineers was despatched to the Colony under the command of Colonel Moody, R.E., who was at the same time created head of the Lands Department, and, in the absence of the governor, vice-governor of the Colony.

Accordingly we find that early in 1859—that is to say, a few months after his arrival—Governor Douglas issued a proclamation in the Colony dealing with the subject of land. Beginning with the assertion and declaration of the right of the Crown to the whole land of the Colony, it proceeded to state the terms on which the Crown would give grants to the settlers, and then in paragraph 3 the following announcement is made: "It shall also be competent to the Executive at any time to reserve such portions of the unoccupied Crown lands and for such purposes as the Executive shall deem advisable."

It does not seem open to doubt that in so reserving land the governor might be acting with a view to various objects. He was there with autocratic power to act in the interests alike of the Imperial Government and of the nascent Colony. Accordingly it was equally within his province to reserve such land as he might consider advisable for purposes of Imperial strategy or defence, or to reserve such land as the future development of the Colony might suggest was inadvisable to part with. The purposes might be various, but town sites and mineral lands may be taken as a sample. Nay more, reservations might even be temporary, and mean no more than that the survey, which was the usual preliminary to sale to the individual, was not yet sufficiently advanced in the neighbourhood in question.

It is here that the rival contentions emerge. The respondent contends that the reservation of the land in question was either Imperial, and transferred to the Dominion by special grant which will be mentioned; or, if not, was colonial for a public purpose, in which case it is transferred to the Dominion by virtue of the

J. C. 1906

ATTORNEY-GENERAL OF BRITISH COLUMBIA v. ATTORNEY-GENERAL OF CANADA.

108th section of the British North America Act, 1867, and relative schedule.

The appellants contend that the reservation was of the latter character, and that the purpose was not public, and that consequently the land falls to the Colony in virtue of s. 117 of the British North America Act.

Their Lordships agree that this is a fair statement of the question. Something was said in the Court below and in argument as to onus. It seems, however, to their Lordships that once it is admitted that the land in question is de facto a reserve, there is no onus on one side or the other. It becomes a pure question of fact to determine what class of reserve it is.

Viewed as a question of fact, their Lordships have come to the conclusion, without difficulty, that the land in question was originally, and subsequently was maintained, as a military reserve; that accordingly it remained Imperial property at the time of the British North America Act, and fell neither to the Colony in virtue of s. 117, nor to the Dominion in virtue of s. 108, but that it was transferred to the Dominion by the Imperial Government in virtue of a despatch. In other words, they agree with the conclusion in fact reached by Drake and Irvine JJ. in the Supreme Court; and they will state shortly their reasons for so doing.

Among the first of Governor Douglas's duties was the selection of a capital for the new Colony. This capital was to be chosen for strategical as well as other reasons; and there is a long and reasoned report from Colonel Moody as to the selection of a site on the Fraser River upon a spot which afterwards became the site of New Westminster. Among other subjects he specially discusses the case of protecting the rear of the position by means of fortifying Burrard Inlet, and there is a reference, which cannot be mistaken, to the ground at the Narrows. This choice was approved by the home Government after the communication had been laid before both the Admiralty and the War Office. It is certain that thereafter portions of land were set aside as military and naval reserves. This is admitted by the appellant in the case of the naval reserves, but the difference is said to consist in the fact that there is extant distinct evidence of the

Admiralty having approved of certain portions of land, while no such evidence is adduced as to the War Office. This, however, seems to their Lordships a misunderstanding of the position. There was no question of contract. Governor Douglas, acting through Colonel Moody, had power to reserve what he chose, and it needed no adhesion on the part of the Admiralty or the War Office to make the reservation effectual. All that such adhesion can do is to afford more or less evidence of identification. Nor, if it were permissible to speculate, would it be difficult to surmise the reason for the difference. Governor Douglas had with him no representative of the Admiralty. But Colonel Moody was in direct communication with the War Office.

Turning now to identification, there is a plan known as Exhibit 4, produced out of the Land Office, admittedly made at an early period, and purporting to be a plan of reserves. It contains the known naval reserves. It also contains Stanley Park and Deadman's Island marked as a reserve and embraced in the same colouring. By itself that is not conclusive, for there are other reserves marked which are certainly not military reserves. But it is important as shewing that this land was de facto reserved at a very early period, and it is known that it has remained reserved ever since.

Their Lordships have already pointed out the probability of its reservation for military purposes in Colonel Moody's original report, but the evidence is far from stopping there.

First, there is the marking in Corporal Turner's field notes. Corporal Turner was under Colonel Moody, and was engaged in 1861-63 to survey the coast line at this place. Corporal Turner is still alive, and was examined, and he produced the field notes he made at the time. On these field notes Stanley Park is marked as "military reserve." Their Lordships must here remark that they think an entirely erroneous view of this evidence was pressed on the trial judge in argument and accepted by him. It being admitted that Corporal Turner had no power to make a reserve, it was contended that such evidence was secondary and inadmissible. This seems a misapprehension. The evidence is not evidence of the actual marking of the

J. C. 1906

ATTORNEY-GENERAL OF BRITISH COLUMBIA v. ATTORNEY-GENERAL OF CANADA.

reserve; but it is perfectly good valeat quantum as serving to refresh Corporal Turner's recollection, and as shewing that a man then on the spot put down military reserve as the then existing designation of the land in question.

Secondly, in December, 1872, soon after the Colony received a Legislature, an address was moved for in the Legislative Assembly for a return of Government reserves. This was made up in the Land Office, and gives as one of the reserves a piece of land south of the First Narrows reserved for military purposes. This again by itself would not be conclusive, but goes far to shew the office idea at the time.

Thirdly, in 1883-84 a proposal was mooted from the home Government to transfer to the Dominion such naval and military reserves as it had in British Columbia. In order to do so the home Government (Colonial Office) consulted the Admiralty and War Office, and from the War Office they received a schedule of reserved lands which they were willing should be so transferred. Amongst them were two parcels of land "on the south shore of Burrard Inlet near Coal Harbour," and on "south shore of First Narrows," which between them seem entirely to include the land in question. Now it is certain that the information of the War Office could only be derived from communications made long before by Colonel Moody.

These lands were accordingly transferred to the Dominion by despatch of March 27, 1884. That despatch, with its enclosure, seems to their Lordships at once to complete the identification and to transfer the title to the Dominion Government.

For these reasons their Lordships thought it their duty, as they stated on July 27 last, humbly to advise His Majesty to dismiss the appeal and affirm the judgment complained of.

There will be no order as to costs.

Solicitors for appellant: *Gara, Rook & Winterbotham.*
Solicitors for respondent: *Charles Russell & Co.*

[PRIVY COUNCIL.]

COLONIAL BANK OF AUSTRALASIA, LIMITED . . . . . } DEFENDANTS;

AND

MARSHALL AND ANOTHER . . . . . PLAINTIFFS.

J. C.*
1906
May 24, 25; *July* 27.

ON APPEAL FROM THE HIGH COURT OF AUSTRALIA.

Banker and Customer—Cheques drawn with Spaces, afterwards fraudulently filled up—Liability of Bank—Duty of Customer—Negligence.

Held, that the mere fact that a cheque is drawn with spaces which can be utilized for the purpose of fraudulent alteration is not by itself any violation of duty by the customer to his banker.

Five cheques were drawn on the defendant bank by the two plaintiffs and defendant M. to the debit of their joint account. After they were signed by the plaintiffs, M. enhanced their apparent amounts by adding words and figures in the blank spaces to the left of those originally written.

In a suit to recover the balance of account the bank claimed to debit it with the enhanced amounts of the cheques, and the jury found that the bank could not, by the exercise of ordinary care and caution, have avoided paying the cheques as altered, and that the cheques were drawn by the plaintiffs in neglect of their duty to the bank:—

Held (affirming the High Court), that there was no evidence of negligence on the part of the respondents proper to be left to the jury.

Scholfield v. *Earl of Londesborough*, [1896] A. C. 514, followed.

APPEAL by special leave from a decree of the High Court (October 27, 1904), reversing a decree of the Supreme Court of Victoria (June 7, 1904), which had affirmed the judgment of Madden C.J. for the appellants at the trial.

The action was brought in effect, under the circumstances stated in their Lordships' judgment, to recover 450*l.*, the amount which the bank had, as the plaintiffs alleged, negligently and without reasonable care and skill paid in respect of cheques drawn by them, which afterwards had been fraudulently altered and increased to that extent without their authority. The bank pleaded that the cheques had been drawn without reasonable care

* *Present:* THE EARL OF HALSBURY, LORD MACNAGHTEN, SIR ARTHUR WILSON, and SIR ALFRED WILLS.

J. C. 1906 COLONIAL BANK OF AUSTRALASIA, LIMITED v. MARSHALL.

and precaution, and in a manner and form so negligent that they had enabled and permitted the alterations to be made, that it paid them in good faith, and that the plaintiffs were estopped from alleging that any of the cheques had been fraudulently altered. The Chief Justice directed the jury that if a customer draws or signs or issues cheques on his banker in a manner which the jury thinks so negligent that it induced or caused opportunity to or was a temptation to a person desirous of effecting a forgery to effect that forgery so that a banker is exposed to the payment of a larger sum than the customer intended, then the customer is precluded and estopped from complaining and shewing that the banker paid a forged and altered cheque.

Judgment was entered for the bank in accordance with the verdict, and the Supreme Court of Victoria affirmed it on appeal. They also treated the case as one of estopped by reason of the negligence of the customer in drawing cheques capable of subsequent alteration, and in such an unusual way as to afford facilities for fraud.

The High Court of Australia reversed this judgment. "The substantial question for our decision is whether the mere failure to take precautions against forgery is a breach of the implied duty by a customer to his banker. If it is it would appear prima facie that a similar duty must be implied in the case of all contracts in which the duties of one party arise upon written communications from the other." They referred to *Union Credit Bank* v. *Mersey Dock* (1), and added: "If the doctrine applies to the case of a cheque, it must also apply to the acceptor of a bill as between him and the drawer, and it should in principle apply to every case in which one man by a written communication requires or requests the performance of some act or duty by another. There is no trace of any such doctrine to be found in the English law, but the contrary rule—that a forgery is a nullity—is well established. A fraudulent exercise of an actual and apparently unlimited authority, however created, is of course not a forgery in the sense in which that term is here used." In the judgment of the High Court, "when a

(1) [1899] 2 Q. B. 205.

person signs a writing which is on the face of it a complete document and issues it to another, he is not bound by any subsequent alteration of it made without his authority, and such authority cannot be inferred merely from the existence of blank spaces in the document. It may well be that the existence of blank spaces combined with other circumstances, either intrinsic to the document or extrinsic, may be evidence of delegated authority to fill them up. But the mere existence of a blank is not sufficient. It follows that the dictum of the learned Chief Justice—so far as it laid down that if a cheque is so drawn as to invite or afford opportunity for or temptation to forgery the customer is estopped from complaining of the forgery—cannot be supported."

On the question whether there was in the present case any evidence to be left to the jury of negligence or breach of duty on the part of the respondents, the High Court said: "The cheques, as already said, were on their face complete documents; the words denoting the amount began with a capital letter, and the person by whom they were filled up was a person with whom the plaintiffs had had dealings for many years and whose honesty they had no reason to suspect. The cheques were however capable of fraudulent alteration. Under these circumstances there was in our opinion no evidence to go to the jury of any breach of duty such as would give rise either to estoppel or to a claim for damages."

Cohen, K.C., Lush, K.C., and *Butterworth*, for the appellants, contended that the duty of a customer to his banker was to exercise ordinary and reasonable care in drawing cheques so as to protect his banker against the risk of paying a larger sum than was intended. Whether the respondent did so or not was a question for the jury, and the respondents were bound by that finding. Here one of the drawers himself committed the fraud, and the plaintiffs under the circumstances were bound to indemnify the bank against the loss resulting therefrom. Of two innocent persons the one who gives opportunity for the fraud must suffer. They referred to *Young* v. *Grote* (1); *Bank*

(1) (1827) 4 Bing., N.C. 253.

J. C. 1906 COLONIAL BANK OF AUSTRALASIA, LIMITED v. MARSHALL.

of England v. *Vagliano* (1); *Nash* v. *De Freville* (2); *Hogg* v. *Skeen* (3); *Scholfield* v. *Earl of Londesborough* (4); *Adelphi Bank* v. *Edwards.* (5) Some of these were not cases arising between banker and customer. Cases of this kind are decided in favour of the banker on the ground of the special duty owed by the customer: see *Governor, &c., of Bank of Ireland* v. *Trustees of Evans' Charities* (6); *Ex parte Swan* (7); *Swan* v. *North British Australasian Co.* (8); *Halifax Union* v. *Wheelwright* (9); *Mayor, &c., of Merchants of the Staple of England* v. *Bank of England* (10); *Johnson* v. *Crédit Lyonnais Co.* (11); *Baxendale* v. *Bennett* (12); *London and S. W. Bank* v. *Wentworth* (13); *Marcussen* v. *Birkbeck Bank* (14); Paget on Law of Banking, 148; *Union Credit Bank* v. *Mersey Docks* (15); Beven on Negligence, 2nd ed. p. 1601.

Neville, K.C., and *Sargant*, for the respondents, contended that the increases in the cheques in suit were not signed or authorized by the respondents, but were forgeries. They did not entitle the appellants to pay the increased amount out of the joint trust account. The respondents, in signing the cheques, had no reason to suspect Myers; and, even if the case were one of negligent drawing by a customer and of subsequent alteration by a third party, such negligence is not sufficient to charge the customer by estoppel or otherwise. No contract, express or implied, was shewn sufficient to cast on the respondents liability for the losses occasioned by the forgery and fraud of Myers. They were not occasioned proximately by any negligence of the respondents, and there is nothing in this case to displace the general rule that the risk of forgery is a banker's risk and not a customer's risk. The only authority in favour of the appellant is *Young* v. *Grote* (16), and that has been seldom followed and frequently distinguished:

(1) [1891] A. C. 107, 123.
(2) [1900] 2 Q. B. 72.
(3) (1865) 18 C. B. (N.S.) 427.
(4) [1896] A. C. 514.
(5) 26 Solicitors' Journal, 1882, p. 360, cited in *Scholfield's Case.*
(6) (1885) 5 H. L. C. 389, 410.
(7) (1860) 30 L. J. (C.P.) 113; 7 C. B. (N.S.) 400, 433.
(8) (1863) 2 H. & C. 175.
(9) (1875) L. R. 10 Ex. 183.
(10) (1887) 21 Q. B. D. 160.
(11) (1877) 3 C. P. D. 32, 43.
(12) (1878) 3 Q. B. D. 525, 534.
(13) (1880) 5 Ex. D. 96.
(14) (1889) 5 Times L. R. 179, 463, 646.
(15) [1899] 2 Q. B. 205.
(16) 4 Bing., N.C. 253.

see *Nash* v. *De Freville* (1); *Scholfield* v. *Earl of Londesborough*. (2) *Young* v. *Grote* (3) is only an authority in the case of blank cheques being drawn. It was contended on the authority of the actual decision in the case of *Scholfield* v. *Earl of Londesborough* (2), or at any rate of the general reasoning on which that and other analogous decisions have been based, that the respondents had not violated any known and established duty which they owed to their bankers.

Cohen, K.C., replied.

1906
July 27.

The judgment of their Lordships was delivered by

SIR ARTHUR WILSON. The two respondents Marshall and Day and one Myers were executors of Ann Myers. As such they opened an account with the appellant banking company in Melbourne on March 24, 1900, when they paid in a sum of 1596*l.* 15*s.* 2*d.*; and against that account cheques were from time to time drawn signed by the three executors. On May 25, 1900, before any of such cheques were drawn, the three executors addressed a letter to the bank, by which they requested the bank to pay cheques signed by the three, and sent specimens of their signatures. The course of business followed by the three executors amongst themselves was this. Myers, who alone resided in Melbourne, drew each of the cheques, sent it for signature to Marshall, who signed first, then to Day, who signed second, and finally added his own signature.

Out of the total number of the cheques so drawn the present controversy relates to five cheques, which, as originally drawn by Myers and signed by Marshall and Day, were for 10*l.*, 2*l.* 6*s.* 4*d.*, 50*l.*, 10*l.*, and 10*l.* But each of these cheques was so written out as to leave a space between the left hand margin and the statement of the amount of the cheque, both as given in words and as given in figures, and in that condition it was signed by Marshall and Day. Myers, by acts amounting to simple forgery, added words and figures to the left of those originally written in the cheques, so turning them apparently into cheques for 110*l.*, 32*l.* 6*s.* 4*d.*, 150*l.*, 110*l.*, and 110*l.* The cheques in their

(1) [1900] 2 Q. B. 72. (2) [1896] A. C. 514.
(3) 4 Bing., N.C. 253.

J. C. 1906 COLONIAL BANK OF AUSTRAL-ASIA, LIMITED v. MARSHALL.

altered forms were presented to and paid by the bank. And it has been found (and their Lordships accept the finding) that the bank could not, by the exercise of ordinary care and caution, have avoided paying the cheques as altered.

When the forgeries came to light the bank claimed to debit the executors' account with the amounts of the cheques as paid by it in their altered form; whilst the respondents contended that the debit should only be of the original amounts of the cheques. The aggregate of the differences was 450*l*.

The suit out of which the present appeal arises was then brought in the Supreme Court of Victoria by the respondents against the bank, Myers being added as a defendant as he refused to join as a plaintiff. The statement of claim, amongst other allegations, set out in outline the facts already stated, and put the plaintiffs' claim upon several alternative grounds, which need not be considered. The defence raised the whole question now material in paragraph 11, which said:—

"If the said cheques or any of them were fraudulently altered and increased in amount, such cheques were, and each of them was, drawn by the plaintiffs and the defendant Myers without reasonable care or precaution, and in a manner and form so negligent, that they enabled and permitted the alterations and erasures, if any."

And it was contended that the plaintiffs were, by reason of the facts so stated, "estopped from alleging that the cheques so altered and increased in amount, were not their cheques, or drawn by them, or with their authority, and from alleging that the said cheques, or any of them, were in fact fraudulently altered and increased in amount."

The case was tried before Madden C.J. and a jury, and at the trial the facts proved, so far as they are now material, were those which have been stated. The learned Chief Justice, in charging the jury, left to them the question, "Were the cheques, or any of them, drawn by the plaintiffs negligently having regard to what I have told you?" And he proceeded to say: "If a customer of a bank is drawing a cheque upon that bank, it appears according to our law (as I think it still exists) that the customer is bound to avoid such negligence in drawing out

his cheque as will unreasonably expose the banker to the risk of having to pay more than the proper amount of the cheque which was drawn out by such customer."

The learned Chief Justice afterwards explained his view a little more fully by saying: "If you draw a cheque in a manner which a jury thinks is so negligent that it induced or caused opportunity to a person who chances to be desirous of committing a forgery to effect that forgery, so that the banker is exposed to the paying of a larger sum than you, the customer, intended when you signed the cheque, then the law is, that if a jury is of opinion that such action of the customer amounts to negligence, and negligence of such a kind as in the opinion of the jury ought to preclude him from complaining of the fact that the banker paid the altered cheque, then the customer cannot complain against the bank."

The jury answered the question thus left to them in the affirmative as to all the cheques in controversy, and found a verdict for the defendant bank, upon which judgment was entered for the defendant bank with costs. And the Full Court, on appeal, approved the ruling of the Chief Justice, and affirmed the judgment.

The now respondents appealed to the High Court of Australia. And that Court reversed the decision of the Supreme Court of Victoria, and dismissed the suit, holding that the ruling of the Chief Justice was not in accordance with law, and that there was no evidence of negligence proper to be left to the jury. Against that decision of the High Court the present appeal has been brought.

In the course of the argument of the appeal before their Lordships, as well as in the Courts in Australia, much was said about the case of *Young* v. *Grote* (1), a case always cited in connection with this branch of the law. That case, however, was critically examined in the House of Lords in the case of *Scholfield* v. *Earl of Londesborough* (2), and the latter case has now become the governing authority which must prevail so far as the principles laid down in it extend.

In order to appreciate the effect of that decision, it is necessary

(1) 4 Bing., N.C. 253. (2) [1896] A. C. 514.

J. C. 1906 COLONIAL BANK OF AUSTRALASIA, LIMITED v. MARSHALL.

to notice the history of the case and the manner in which it came before the House of Lords. The suit was by a holder for value of a bill of exchange against the acceptor, in which the plaintiff sought to make the defendant liable for the full apparent amount of a bill accepted by him, and subsequently increased in apparent amount by a forger on the ground that the bill, as accepted by the defendant, was drawn in a manner so negligent as to have facilitated the forgery subsequently committed. The case was tried before Charles J. without a jury, and the learned judge had to deal, and dealt, with two principal propositions essential to the plaintiff's success. The first was that the law merchant imposes upon everyone who accepts a bill of exchange with a view to its circulation the duty of taking reasonable precautions, in order to prevent the possibility of its amount being fraudulently increased. That proposition the learned judge accepted. The second principal proposition dealt with by the learned judge was that, on the facts of that case, the acceptor of the bill had been guilty of such negligence as to bring him within the operation of the first proposition. This second proposition was rejected by the learned judge, who accordingly dismissed the suit. In order to shew the connection between that case and the present, it is sufficient to say that there is no suggested ground of negligence in this case which was not present in *Scholfield* v. *Earl of Londesborough*. (1)

An appeal against the judgment of Charles J. was brought in the Court of Appeal, and in that Court two of the Lords Justices rejected both propositions, holding not only that no such duty as alleged lies upon the acceptor of a bill of exchange, but also that, assuming the existence of such a duty, it had not been violated. The third Lord Justice accepted both propositions as correct, and thought that the plaintiff in the case ought to succeed.

The appeal to the House of Lords impugned, therefore, the correctness of the two rulings of the majority of the Court of Appeal, and the argument proceeded on the same lines. So that both the propositions referred to were directly in question before the House of Lords.

(1) [1896] A. C. 514.

The first proposition was expressly negatived by the House of Lords, but so far the decision does not directly affect the present case, for the contractual relation existing between a banker and his customer differentiates their case from that of the acceptor and the holder of a bill, and this was pointed out by several of their Lordships. It was recognized that there is or may be a duty on the part of the drawer of a cheque towards his banker which does not exist on the part of the acceptor of a bill towards the holder. It was recognized that "if the . . . . customer by any act of his has induced the banker to act upon the document by his act, or neglect of some act usual in the course of dealing between them, it is quite intelligible that he should not be permitted to set up his own act or neglect to the prejudice of the banker whom he has thus misled, or by neglect permitted to be misled." (1) No attempt was made to define the extent of such obligation ; it was unnecessary to do so in that case, nor do their Lordships propose now to attempt any abstract definition of such duty. Indeed, it would be impossible to do so, seeing that the extent of the duty may depend upon an agreed or established course of dealing between the parties.

But the duty which, according to the ruling of the learned Chief Justice, subsists between customer and banker is substantially the same as that contended for in *Scholfield* v. *Earl of Londesborough* (2) as existing between the acceptor and the holder of a bill. And, as has been pointed out, the House of Lords had before them, on the appeal, the question whether the Court of Appeal was right in ruling that the facts found in that case (which included everything existing in the present case) did not amount to a breach of the obligation, supposing that obligation to exist.

Not one of the members of their Lordships' House appears to have expressed the slightest disapproval of that ruling, and most of their Lordships distinctly approved of it. The Lord Chancellor (3) expressed his concurrence in the opinion of Lindley L.J., "that it was wrong to contend that it is negligence to sign a negotiable instrument so that somebody else can tamper

(1) [1896] A. C. at p. 523. (2) [1896] A. C. 514.
(3) [1896] A. C. at p. 532.

J. C.
1906
COLONIAL BANK OF AUSTRAL-ASIA, LIMITED v. MARSHALL.

with it; and the wider proposition of Bovill C.J. in a former case, *Société Générale* v. *Metropolitan Bank* (1), that people are not supposed to commit forgery, and that the protection against forgery is not the vigilance of parties excluding the possibility of committing forgery, but the law of the land." Lord Watson (2) approved the same rulings. Lord Macnaghten (3) expressed the same opinion, and Lord Davey concurred in the judgment of Lord Watson.

The principles there laid down appear to their Lordships to warrant the proposition that, whatever the duty of a customer towards his banker may be with reference to the drawing of cheques, the mere fact that the cheque is drawn with spaces such that a forger can utilize them for the purpose of forgery is not by itself any violation of that obligation. Their Lordships therefore agree with the High Court of Australia in holding that there was no evidence proper to be left to the jury of negligence on the part of the respondents. They will humbly advise His Majesty that this appeal should be dismissed.

The appellant bank will pay the respondents' costs of and incidental to the appeal as between solicitor and client.

Solicitors for appellants: *Blyth, Dutton, Hartley & Blyth.*
Solicitor for respondents: *John Bartlett.*

1) (1873) 27 L. T. (N.S.) 849, 856. (2) [1896] A. C. at p. 540.
(3) Ibid. at p. 544.

[PRIVY COUNCIL.]

EMMERSON . . . . . PLAINTIFF; J. C.*

AND 1906

MADDISON . . . . . DEFENDANT. *July* 12, 13, 27.

ON APPEAL FROM THE SUPREME COURT OF CANADA.

Crown Land in New Brunswick—Adverse Possession for less than Sixty Years—Grant by the Crown during adverse Possession valid—Rights of Grantee— 21 *Jac.* 1., *c.* 14—*Construction.*

In an action of ejectment it appeared that the land belonged to the Crown, and was in peaceable possession of its grantee, the defendant, but that the plaintiff and his predecessors in title had enjoyed uninterrupted occupation thereof for a period of fifty-six years down to a date about seven years prior to date of action:—

Held, that judgment was rightly entered for the defendant.

Occupation against the Crown for any period less than the sixty years required by the Nullum Tempus Act is of no avail against the title and legal possession of the Crown, and still less against its grantee in actual possession.

The Act 21 Jac. 1, c. 14, only regulates procedure, and its effect is that if an information of intrusion is filed and the Crown has been out of possession for twenty years, the defendant is allowed to retain possession till the Crown has established its title. Where no information has been filed there is nothing to prevent the Crown or its grantee from making a peaceable entry and then holding possession by virtue of title.

Decisions by the Courts of New Brunswick and Nova Scotia, to the effect that when the Crown has been out of actual possession for twenty years it could not make a grant until it had first established its title by information of intrusion, overruled.

APPEAL by special leave from a decree of the Supreme Court (April 27, 1904), reversing a judgment of the Supreme Court of New Brunswick (February 5, 1903).

The action was one of ejectment brought in 1902 by the appellant under the circumstances stated in their Lordships' judgment in respect of a piece of Crown land called in the evidence a mill site. The respondent defended his title and possession under a grant from the Crown in 1895. The appellant relied on an uninterrupted possession by himself and his

* *Present:* LORD MACNAGHTEN, LORD DUNEDIN, LORD ATKINSON, SIR ARTHUR WILSON, and SIR ALFRED WILLS.

J. C. 1906 EMMERSON v. MADDISON.

predecessors in title for the fifty-six years then next preceding the defendant's grant. The Consolidated Statutes of New Brunswick, c. 84, s. 1, enacted that adverse possession for sixty years barred an action by the Crown. At the trial the appellant contended that no title passed from the Crown to the respondent under the said grant, for three reasons:—

(*a*) The Crown was out of possession at the time it undertook to grant the land, and on that account could not make a valid grant of the same;

(*b*) That under the Imperial statute 21 Jac. 1, c. 14, the Crown, having been out of possession of the land for upwards of twenty years, could not make a valid grant of the land, or pass its title therein, to the defendant until it had first recovered possession thereof by means of an information of intrusion; and

(*c*) Whether or not the true construction of 21 Jac. 1, c. 14, created a disability in the Crown to grant this land until it recovered possession by an information of intrusion, the Supreme Court of New Brunswick had adopted this construction for so long a time that it is the settled law of the province.

The decisions adopting this construction are *Doe* d. *Ponsford* v. *Vernon* (1), *Smith* v. *Morrow* (2), and *Murray* v. *Duff.* (3)

Landry J., trying the case without a jury, held that these cases compelled him to enter judgment for the appellant; and the Supreme Court of New Brunswick refused to set it aside for the same reason.

The Supreme Court of Canada, however (Davies J. dissenting), reversed the judgment, and entered the verdict for the respondent.

Nesbitt J. delivered the judgment of the majority, holding that the statute in question merely affected the course of procedure upon an information of intrusion, and did not affect the right of the Crown to grant or of the grantee to enter upon or recover possession of the land intruded upon. Davies J., on the other hand, held that, whereas at common law the Crown was treated as if it had never lost possession to an intruder however long

(1) (1843) 4 N. B. (2 Kerr) 351. (2) (1872) 14 N. B. (1 Pugs.) 200.
(3) (1893) 33 N. B. Rep. 351.

established, since the statute the possession of an intruder was recognized until the title of the Crown was established, and that the effect of this, having regard to the general principle that the Crown might not assert its title by entry without legal process, was to make an information of intrusion essential, and that neither the Crown nor its grantee could dispossess the intruder by simply taking possession.

Jones (Solicitor-General for New Brunswick) and *Rowlatt*, for the appellant, contended that this judgment was erroneous. There had been open continuous exclusive and adverse possession of the land by the appellant for upwards of twenty years prior to the grant of 1895. The Crown had been out of possession for the like period, as well as at the time of issuing the grant. They contended that therefore the grant was invalid, and did not pass title to the respondent. They referred to 21 Jac. 1, c. 14, s. 1, and submitted that under that section the grant was invalid, as the Crown had not first established its title by information of intrusion.

[LORD MACNAGHTEN. That statute is in favour of defendants in possession. You are plaintiff in ejectment, and must prove your title.]

The decisions of the New Brunswick Courts extend over sixty years, and were founded on *Doe* d. *Watt* v. *Morris*. (1) The law of real property is essentially of local application, and weight should be given to local decisions establishing an important rule, which cannot be altered after so long a period without causing much disturbance of title. Relying on those decisions parties in possession for much less than sixty years have spent large sums thereon, and both surveyors and occupants have not exercised the care which they otherwise would have done as to including in Crown grants lands in the peaceable possession of third parties. The Crown could not itself, according to those decisions, enter on possession without bringing an information of intrusion, and consequently its grantee could not do so. Reference was made to *Willion* v. *Berkley* (2); *Magdalen College*

(1) (1835) 2 Bing., N. C. 189. (2) (1562) Plowden, 248.

J. C. 1906 EMMERSON v. MADDISON.

Case (1); Co. Litt. p. 214, s. 347; *Dowtie's Case* (2); *Asher* v. *Whitlock* (3); *Doe* d. *Harding* v. *Cooke* (4); *Doe* d. *Dowling* v. *Pearson* (5); *Morgan* v. *Crawshay* (6); *Lancashire and Yorkshire Ry. Co.* v. *Mayor of Bury.* (7)

Powell, K.C., for the respondent, contended that both at common law and by statute the action failed. By the former the King could not be disseised. Both in New Brunswick and in England the principle is well established that the Crown has power to grant land though it is not in actual possession: see Comyn's Digest, Prerogative (D), 65; *Wyngate* v. *Maske* (8); Viner's Abridgment, vol. 17, Prerogative, p. 217, s. 9; *Taylor* v. *Horde.* (9) It is not want of possession, but lack of seisin, which invalidates a grant: *Doe* d. *Fitzgerald* v. *Finn* (10), in which is a case cited by the Chief Justice from Hob. 322, to the effect that, the King not being disseised by an intruder, his conveyance is good, and his grantee is seised by virtue of it. Ejectment will not lie by the King, for he cannot lose possession, and can pass title: see *Ward* v. *Bartholomew* (11); *Jackson* v. *Winslow* (12), per Chancellor Kent. Neither the common law rule nor the statute making void as to the party in possession conveyances of land held adversely applies to conveyances by the people of the State or by public officers duly authorized: *The People* v. *Mayor of New York* (13); *Sparks* v. *Pierce* (14); *Morrow* v. *Whitney* (15); *Oaksmith's Lessee* v. *Johnston.* (16)

Then, as to the construction of the statute of James, the common law right of the Crown to grant and of its grantee to take its land whilst in possession of an intruder is not interfered with. All that the Act does on its true construction is to enact a rule of procedure. Apart from conferring a right on a defendant

(1) (1616) 6 Coke's Rep. 125.
(2) (1584) Coke's Rep. pt. 3, p. 10a (vol. 2, p. 25); also Leonard, 21, where it is called the *Duke of Northumberland's Case.*
(3) (1865) L. R. 1 Q. B. 1.
(4) (1831) 7 Bing. 346.
(5) (1846) 5 N. B. (3 Kerr) 135.
(6) (1871) L. R. 5 H. L. 304, 319.
(7) (1889) 14 App. Cas. 417.
(8) (1592) Cro. Eliz. 275.
(9) (1757) 1 Burrows, 109.
(10) (1845) 1 Upp. Can. Q. B. 70, 95.
(11) (1828) 6 Pickering, 408, 415 (Massachusetts).
(12) (1806) 2 Johnson, S. C. Rep. 83 (N. Y.).
(13) (1858) 28 Barbour, 253.
(14) (1885) 115 U. S. Rep. 408, 413.
(15) (1877) 95 U. S. Rep. 551, 557.
(16) (1875) 92 U. S. Rep. 343, 347.

to an information under certain conditions to remain in possession pendente lite, which he did not previously possess, the Act does not confer on any intruder any right of possession or interest in the land. The decisions of the New Brunswick Courts, so far as they decide to the effect that this grant is invalid under the circumstances, are contrary to the plain meaning of the Act, and cannot prevail against it. No title or vested right of the appellant is prejudicially affected by rejecting that construction of the Act, for under that construction, assuming it to be right, the appellant was liable to be ejected at any time prior to the expiration of sixty years by information of intrusion. Besides, the appellant not being in possession is not within the statute, and even if the grant was invalid, the grantee could set up in ejectment the jus tertii, viz., the title of the Crown. Reference was made to *Doe* d. *Fitzgerald* v. *Finn* (1); *Scott* v. *Henderson* (2); *Smith* v. *McDonald* (3); *Doe* d. *Watt* v. *Morris* (4); *Attorney-General* v. *Corporation of London* (5); *Doe* d. *Ponsford* v. *Vernon* (6); *Smith* v. *Morrow* (7); *Murray* v. *Duff* (8); *Parker* v. *Baldwin* (9); *Lows* v. *Telford*. (10)

Jones (S.-G. for New Brunswick) replied.

The judgment of their Lordships was delivered by

SIR ALFRED WILLS. The essential facts are very short and not in dispute.

The appellant and those whom he represented in title had enjoyed uninterrupted occupation of a piece of land in the province of New Brunswick, of about nine acres, from 1839 to 1895, a period of about fifty-six years. No rent had been paid, and the occupation was open and unchallenged down to some time in 1895. This piece of land, described as a mill site in various conveyances under which it had passed, was and is land belonging to the Crown. The period of occupation was some three or four years short of the time necessary under the

(1) 1 Upp. Can. Q. B. 70.
(2) (1843) 2 Thomp. N. S. Rep. 115.
(3) (1863) 1 Oldwright, 274.
(4) 2 Bing., N.C. 189.
(5) (1850) 2 Mac. & G. 247.
(6) 4 N. B. (2 Kerr) 351.
(7) 14 N. B. (1 Pugs.) 200.
(8) 33 N. B. 351.
(9) (1809) 11 East, 488.
(10) (1876) 1 App. Cas. 414.

J. C. 1906

EMMERSON v. MADDISON.

Nullum Tempus Act to give a right as against the Crown by length of occupation.

In 1895 the defendant obtained a grant of this same piece of land from the Crown, and during the temporary absence of the plaintiff or anyone on his behalf, entered peaceably upon it and has continued in occupation. The judgment of Landry J., the trial judge, was by agreement between the parties to be taken as an adequate statement of the facts. That judgment, to those who had not heard the trial, leaves it in some uncertainty whether he meant that the plaintiff's occupation had or had not come to an end when the defendant obtained his grant and entered into possession, an uncertainty which can have had no place in the minds of those familiar with the discussion which had taken place. Mr. Rowlatt, counsel for the plaintiff, stated that in fact his occupation had *not* ceased, and Mr. Powell for the defendant did not seek to qualify this statement. There are expressions in the judgments below which suggest the same conclusion, and although they are not those of learned judges who had listened to the evidence, it is clear that the subject must have entered into the discussion before them. There is no trace in the judgments of any doubt or difference as to the facts, and it is also clear from the importance attached to the case by the Government of New Brunswick that it must have been so. That Government has taken up the question and intervened in the matter, undertaking to bear the costs of the appeal of both sides. It appears that it has been the practice of that Government to take into consideration, when Crown lands are applied for, the fact and circumstances of long occupation before exercising its discretion, and that upon the present occasion they were not aware of the circumstances which have been mentioned. No complaint was made before their Lordships of the action of the defendant, and the reason why the case is of importance to the department dealing with Crown lands is because the Courts of New Brunswick have taken a view (presently to be mentioned) of an enactment of James I. which has not been adopted by the Supreme Court of Canada, and as to which the Government of the province of New Brunswick is naturally anxious to have a final and authoritative decision.

The plaintiff, finding that the defendant was in occupation of what he had looked upon as his land, brought his action of ejectment, the writ bearing date September 16, 1902. The trial judge, Landry J., on February 5, 1903, gave judgment for the plaintiff. The defendant appealed, and on June 12, 1903, the Supreme Court of New Brunswick unanimously affirmed his decision. The defendant then appealed to the Supreme Court of Canada. The judgment of that Court was delivered on April 27, 1904. Sir H. E. Taschereau C.J., Sedgewick J., Nesbitt J., and Killam J. were of opinion that the appeal should be allowed. Davies J. dissented. Judgment was accordingly entered for the defendant. This appeal has been brought by special leave of His Majesty in Council, granted on August 10, 1904.

On the facts stated, and apart from any question arising upon the statute 21 Jac. 1, c. 14, the case would seem to be a very plain one. The plaintiff had no title to the land, and was a mere trespasser upon it. A plaintiff in ejectment must recover on the strength of his title, and assuming in his favour that evidence of uninterrupted possession for many years, unanswered and unqualified by any other circumstances, would have entitled him to succeed, the moment that it appeared that the land belonged to the Crown, and had not been occupied adversely to the Crown for sixty years, the presumption of ownership from occupation was gone, and as occupation for a period of less than sixty years can avail nothing against the Crown, it would have been shewn that the possession, as well as the right, had always been in the Crown, notwithstanding the occupation of the plaintiff and his predecessors in title. Still more was the plaintiff's case answered when the grant of the Crown to the defendant and his peaceable possession were shewn. Nothing can be better settled than that, if a person having title can get into possession of land in the actual occupation of a person having no title, he may continue such possession, and that the person who was in actual occupation cannot succeed in ejectment against him on the strength merely of his own former occupation. The presumption of title which arises from simple occupation or possession is answered, and the person who has no title cannot succeed against the person who has both title and possession.

J. C. 1906

EMMERSON v. MADDISON.

Does the statute 21 Jac. 1, c. 14, make any difference?

The Act is as follows:—

"An Act to admit the subject to plead the general issue in informations of intrusion brought on behalf of the King's Majesty and retain his possession till trial.

"1. Where the King out of his prerogative royal may enforce the subject in informations of intrusion brought against him to a special pleading of his title, the King's most excellent Majesty, out of his gracious disposition towards his loving subjects, and at their humble suit, being willing to remit a part of his ancient and regal power, is well pleased that it be enacted; and be it enacted by the King's Most Excellent Majesty, the Lords spiritual and temporal and the Commons, in this present Parliament assembled and by the authority of the same, that whensoever the King, his heirs or successors and such from or under whom the King claimeth, and all others claiming under the same title under which the King claimeth, hath been or shall be out of possession by the space of twenty years, or hath not or shall not have taken the profits of any lands, tenements or hereditaments within the space of twenty years before any information of intrusion brought or to be brought to recover the same: that in every such case the defendant or defendants may plead the general issue if he or they so think fit and shall not be pressed to plead specially; and that in such cases the defendant or defendants shall retain the possession he or they had at the time of such information exhibited until the title be tried, found or adjudged for the King.

"2. And be it further enacted that where an information of intrusion may fitly and aptly be brought on the King's behalf, no scire facias shall be brought whereunto the subject shall be forced to a special pleading and be deprived of the grace intended by this Act."

This is the whole of the Act, and their Lordships cannot doubt that its natural construction is that it is an Act regulating procedure merely, and that its effect is to put a person against whom the Sovereign may file an information of intrusion on the same footing as a defendant in an ordinary action of ejectment if the Crown has been out of operation for twenty years, and to allow

him, like a defendant in an ordinary ejectment, to retain such possession as he had at the date of the filing of the information of intrusion until the title of the Crown has been tried and found or adjudged for the Sovereign.

No one untroubled by any decision or supposed decision could, their Lordships think, reasonably come to any other conclusion.

If this view be right, the statute does not help the present plaintiff. No information of intrusion has been filed, and there is nothing for the statute to operate upon. Nor is there a word in the statute to prevent the Crown or its grantee from entering peaceably upon the land and then holding possession by virtue of its title. The possession guaranteed to the defendant under the statute is such as he had at the time of the information exhibited, which shews that these words are confined to cases where an information is filed, and are not meant to give a general right to retain possession unless and until the Sovereign shall file an information, and obtain judgment.

But it is said that there is authority the other way, and the case upon which reliance is placed is *Doe* d. *Watt* v. *Morris* (1), which was decided by the Court of Common Pleas in 1835.

The head-note is as follows :—

"Held, that the conveyance of a manor by the Commissioners of Woods and Forests on the part of the Crown did not entitle the purchaser to maintain ejectment against the possessor of land inclosed from the waste of the manor, more than twenty years before the conveyance, without leave of the Crown."

The point thus decided certainly seems to have very little to do with the question in the present case. But as reliance has been placed on certain expressions in the judgment delivered by Tindal C.J. it is necessary to examine the case a little more closely.

By 57 Geo. 3, c. 97, s. 2, the Commissioners of Woods and Forests were empowered to sell, amongst other things, manors belonging to the Crown within the ordering and survey of the Exchequer. In pursuance of this authority they sold to Watt the manor of Iscoed. Part of the waste of the manor had, more

(1) 2 Bing., N.C. 189.

J. C. 1906 EMMERSON v. MADDISON.

than twenty, and less than sixty, years before been enclosed and occupied, without title or permission from the Crown, and was at the time of the sale of the manor to Watt in the occupation of the defendant Morris. The Court held that under the statute 21 Jac. 1, c. 14, although the Sovereign could not be deprived of the legal possession by the unlawful act of the subject, yet the Crown, if desirous of regaining actual possession, would be put to an information of intrusion; that the statute of 57 Geo. 3 contemplated and authorized the sale of such property only as was in the de facto possession of the Crown, and that the Commissioners had therefore no power, under the circumstances, to sell the enclosed portion of the waste, and that they had not by their certificate affected to sell a right to recover property held in the sense contemplated by 21 Jac. 1, c. 14, adversely to the Crown.

It is obvious that the decision does not touch such a case as the present. The right of the Crown to take peaceable possession, if that were possible, of the land in question, without information filed, was never discussed or considered. It lay entirely outside the subject-matter then dealt with, and the case, therefore, has no bearing upon the matter now under discussion. The Court emphatically asserted the doctrine that the unlawful occupation, however adverse, for a period short of sixty years, of a subject, cannot affect the legal possession of the Crown; and only said that if the Crown desired to regain possession in fact, it would have to proceed by information, as undoubtedly it must under ordinary circumstances. It is not often that the circumstances of the present case could be repeated in an old country. It is plain that the plaintiff in the present case was absent from the land in such a way and under such circumstances that it was supposed that he had given up possession, though it must be assumed, after what has been stated and admitted by counsel, that he had not done so. Great stress has been laid upon the following words in the judgment: "The intruders, after twenty years' adverse possession, were protected even against the Crown itself until a judgment in intrusion"; but all such general expressions must be read with reference to the facts of the case to which they were applied, and

the Court never meant to say that the Crown or its grantee, having undoubted title, would not be able to set it up, should actual possession have been obtained without force and without litigation.

The case really comes to this and no more. The conveyance was of the manor in general terms. The bulk of the manor was in the actual possession of the Crown, a small part had been occupied for over twenty years without leave of the Crown, and without payment of rent or acknowledgment. The conveyance was made under a statute, from the language of which the Court came to the conclusion that only property in the actual and de facto possession of the Crown was intended to be dealt with by the Commissioners under that Act. Consequently they decided that the encroachment upon the waste was not included under the general word "manor," and that therefore the grantee of the manor from the Crown had no title to the encroachment.

No such question can possibly arise here, where the grant from the Crown was of the one specific piece of land, with which alone the ejectment was concerned, and of nothing else. In their Lordships' opinion it is quite correctly said, in the judgment of the Supreme Court of Canada, that in *Doe* d. *Watt* v. *Morris* (1) "there is no hint that the title of the Crown was gone, or that, if an action was not necessary to obtain possession, the Crown could not have taken possession peaceably."

The view that the statute 21 Jac. 1, c. 14, is one relating to procedure only is very clearly laid down by Lord Cottenham in *Attorney-General* v. *Corporation of London.* (2) His Lordship says: "Now, it was said that the statute of James . . . . gives a party against whom the Crown is litigating an advantage different from that which belongs to every other defendant. I do not at all so understand it. The object of the statute was to put a party who was contesting with the Crown" (where the Crown had been out of de facto possession for twenty years, must be added to make the proposition absolutely correct) "in the same situation as a party contesting with any other plaintiff; but here in equity the Crown and the subject always were on the

(1) 2 Bing., N.C. 189. (2) 2 Mac. & G. 247, at p. 258.

J. C. 1906 EMMERSON v. MADDISON.

same footing, and they are on the same footing now. There was no evil, therefore, to be remedied. At law, however, there was, arising from technical reasoning, a great injury accruing to a defendant in litigation with the Crown. The Crown's title was taken to be proved unless a contrary title was set out and pleaded.

There is, in their Lordships' opinion, nothing in *Doe* d. *Watt* v. *Morris* (1) necessarily inconsistent with the proposition that the statute 21 Jac. 1, c. 14, is a statute regulating procedure only, nor, if it were supposed to go further, could their Lordships agree with any such extension of its operation.

The Courts of New Brunswick, however, have taken a different view of the decision in *Doe* d. *Watt* v. *Morris* (1), and have held that when the Crown has been out of possession for twenty years it cannot make a grant until it has first proceeded against the intruder; and it appears that the same opinion has prevailed in Nova Scotia. The history of the doctrine in New Brunswick is not very satisfactory, for it originated with a case of *Doe* d. *Ponsford* v. *Vernon* (2), decided in 1843. The point was neither discussed nor raised in argument, but the Court, in delivering judgment, referred to the case of *Doe* d. *Watt* v. *Morris* (1), to which it gave the effect which has been mentioned. The next case was that of *Smith* v. *Morrow* (3), in which the statute was not discussed in argument, but it seems to have been taken for granted by the Court that the Crown could not grant lands of which it had been out of actual possession for twenty years. In *Murray* v. *Duff* (4), the last of the New Brunswick cases bearing upon the question, the Chief Justice put the same construction upon *Doe* d. *Watt* v. *Morris*. (1)

Two cases have been cited from Nova Scotia, in the first of which, *Scott* v. *Henderson* (5), Bliss J. expressed the same view, which was afterwards expressly adopted as the ground of decision in *Smith* v. *McDonald*. (6)

In the present case four out of the five judges who decided it in favour of the plaintiff rested their judgment almost entirely

(1) 2 Bing., N.C. 189.
(2) 4 N. B. (2 Kerr), 351.
(3) 14 N. B. (1 Pugs.) 200.
(4) 33 N. B. Rep. 351.
(5) 2 Thomp. N. S. Rep. 115.
(6) 1 Oldwright, 274.

on the ground that the current of authority in New Brunswick and Nova Scotia was too strong to be disregarded, and two at least of them intimated pretty plainly that they would have come to a different conclusion if they had not felt themselves bound by previous decisions in those provinces.

Their Lordships therefore cannot feel that they are greatly at variance with judicial opinion, even in New Brunswick, in coming to a different conclusion. They agree substantially with the reasoning of the majority of the Supreme Court of Canada, and will humbly recommend to His Majesty that this appeal should be dismissed. Owing to the arrangement made by the Government of New Brunswick it is unnecessary to say anything about costs.

Solicitors for appellant: *Field, Emery, Roscoe & Medley.*
Solicitor for respondent: *Francis Stewart.*

The Mode of Citation of the Volumes of the *Law Reports*, commencing January 1, 1906, will be as follows:—

In the First Series,
[1906] 1 Ch. [1906] 2 Ch.

In the Second Series,
[1906] 1 K. B. [1906] 2 K. B. [1906] P.

In the Third Series,
[1906] A. C.

INDEX.

ACCIDENT—Workmen's Compensation.
See under EMPLOYER AND WORKMAN.

ACCOUNTS—Purchase by two partners without the knowledge of the third—Suit for an account - - - - - - **494**
See PRIVY COUNCIL APPEALS. 28.

AFFIDAVIT — Discovery — Affidavit of documents—Conspiracy—Criminal offence
See PRACTICE. - - - **434**

AFRICA—Transvaal—Partnership—Purchase by two partners without the knowledge of the third—Rights of partners - **494**
See PRIVY COUNCIL APPEALS. 28.

AGENT—Principal and
See under PRINCIPAL AND AGENT.

AGREEMENT.
See under CONTRACT.

ALIENS—Power to expel and deport aliens—Law of Canada - - - - **542**
See PRIVY COUNCIL APPEALS. 12.

APPEAL—Admitted by the Supreme Court dismissed as incompetent—Special leave to appeal refused - - - - **132**
See PRIVY COUNCIL APPEALS. 26.

—— Right of appeal to the King in Council—Suits to enforce and redeem a mortgage —Laws of India - - - - **212**
See PRIVY COUNCIL APPEALS. 19.

—— Special leave to appeal—Law of Australia **381, 548**
See PRIVY COUNCIL APPEALS. 3, 4.

ARBITRATION—Trespass, Action for—Injunction—Arbitration clause—Failure of company to proceed under their Act—Law of Canada - - - - **110**
See PRIVY COUNCIL APPEALS. 13.

AUSTRALIA—Laws of - **360, 381, 503, 548, 559**
See PRIVY COUNCIL APPEALS. 15.

BANK—Banker and customer—Cheques drawn with spaces, afterwards fraudulently filled up—Liability of bank—Negligence - - - - - - **559**
See PRIVY COUNCIL APPEALS. 1.

BOMBAY—India—Laws of - - - **212**
See PRIVY COUNCIL APPEALS. 19.

BORROWER—Loan transaction—Absence of risk—Exorbitant interest - - **461**
See MONEYLENDER.

BREACH OF CONTRACT.
See under CONTRACT.

BRITISH COLUMBIA—Laws of - **204, 552**
See PRIVY COUNCIL APPEALS. 8, 9.

BRITISH HONDURAS—Laws of - - **515**
See PRIVY COUNCIL APPEALS. 6.

BRITISH NORTH AMERICA ACT—Foreshore, Provincial—Railway company—Laws of British Columbia - - - **204**
See PRIVY COUNCIL APPEALS 8.

—— Military reserve—Title of the Dominion.
See PRIVY COUNCIL APPEALS. 9. **552**

BUILDING—Part only of a house or other building or manufactory, Prohibition against the compulsory acquisition of a—Laws of New South Wales - - - **249**
See PRIVY COUNCIL APPEALS. 22.

"BUILDING"—Screen to prevent acquisition of right to light—Open space - - **1**
See BURIAL.

BURIAL—*Burial Ground—Open Space—Screen to prevent Acquisition of Right to Light—"Building"—Metropolitan Open Spaces Acts*, 1877 (42 & 41 *Vict. c.* 85), *s.* 1. *and* 1881 (44 & 45 *Vict. c.* 34). *ss.* 4, 5—*Disused Burial Grounds Act*, 1884 (47 & 48 *Vict. c.* 72), *s.* 3.

A disused churchyard was held and administered by a borough council as an open space under the Metropolitan Open Spaces Acts, 1877

BURIAL—*continued.*
and 1881, and the Disused Burial Grounds Act, 1884. An adjoining landowner built on his land houses which overlooked the churchyard. To prevent these houses from acquiring any right of light, and to administer the ground with a view to its enjoyment by the public as an open space, the council proposed to erect a screen in the churchyard :—
Held, that a screen erected for such a purpose would not be a "building" prohibited by the Acts, and that the council in erecting it would be rightly administering the Acts.
The decision of the Court of Appeal, *sub nom. Boyce* v. *Paddington Borough Council*, [1903] 2 Ch. 556, reversed, and the decision of Buckley J., [1903] 1 Ch. 109, restored. PADDINGTON CORPORATION *v.* ATTORNEY-GENERAL **H.L. (E.) 1**

CAICOS ISLANDS—Turks and Caicos Islands—Laws of - - - - **254**
See PRIVY COUNCIL APPEALS. 29.

CANADA—Laws of - **100, 110, 117, 187, 196, 204, 241, 535, 542, 552, 569**
See PRIVY COUNCIL APPEALS. 7—17.

CAPE OF GOOD HOPE—Laws of - - **368**
See PRIVY COUNCIL APPEALS. 18.

CASES:—
—— *Alex. Pirie & Sons, Ld.* v. *Kintore (Earl)*, (1904) 5 F. 818.
Affirmed by H. L. (Sc.)
[1906] **A. C. 478**

—— *Alianza Co.* v. *Bell* - [1905] 1 K. B. 184.
Affirmed by H. L. (E.)
[1905] **A. C. 18**

—— *Attorney-General* v. *Ashton Gas Co.*, [1904] 2 Ch. 621.
Affirmed by H. L. (E.) *sub nom.* ASHTON GAS CO. *v.* ATTORNEY-GENERAL
[1906] **A. C. 10**

—— *Back* v. *Dick Kerr & Co.*, [1905] 2 K. B. 148.
Affirmed by H. L. (E.)
[1906] **A. C. 325**

—— *Badische Anilin und Soda Fabrik* v. *Hickson*, [1905] 2 Ch. 495.
Affirmed by H. L. (E.)
[1906] **A. C. 419**

—— *Baily* v. *British Equitable Assurance Co.*, [1904] 1 Ch. 374.
Reversed by H. L. (E.) *sub nom.* BRITISH EQUITABLE ASSURANCE COMPANY *v.* BAILY - - [1906] **A. C. 35**

—— *Bishop Auckland Industrial Co-operative Co.* v. *Butterknowle Colliery Co.*, [1904] 2 Ch. 419.
Affirmed by H. L. (E.) *sub nom.* BUTTERKNOWLE COLLIERY CO. *v.* BISHOP AUCKLAND INDUSTRIAL CO-OPERATIVE CO. - [1906] **A. C. 305**

—— *Boston Fruit Co.* v. *British and Foreign Marine Insurance Co.*, [1905] 1 K. B. 637.
Affirmed by H. L. (E.)
[1906] **A. C. 336**

CASES—*continued.*
—— *Boyce* v. *Paddington Borough Council*, [1903] 2 Ch. 556.
Reversed by H. L. (E.) *sub nom.* PADDINGTON CORPORATION *v.* ATTORNEY-GENERAL - [1906] **A. C. 1**

—— *Boyse* v. *Rossborough* - (1856) 6 H. L. C. 2.
Approved by P. C. BAUDAINS *v.* RICHARDSON- - [1906] **A. C. 169**

—— *Brooks* v. *Brooks' Trustees*, (1902) 4 F. 1014.
See HUNTLY (MARCHIONESS OF) *v.* GASKELL. H. L. (Sc.)
[1906] **A. C. 56**

—— *C. A. Van Eijck and Zoon* v. *Somerville*, (1905) 7 F. 739.
Reversed by H. L. (Sc.)
[1906] **A. C. 489**

—— *Cavalier* v. *Pope* - - [1905] 2 K. B. 757.
Affirmed by H. L. (E.)
[1906] **A. C. 428**

—— *Clergue* v. *Murray* - - [1903] A. C. 521.
Followed by P. C. VICTORIA RAILWAY COMMISSIONERS *v.* BROWN
[1906] **A. C. 381**

—— *Curtis* v. *Old Monkland Conservative Association*, (1904) 7 F. 119.
Reversed by H. L. (Sc.)
[1906] **A. C. 86**

—— *De Beers Consolidated Mines, Ld.* v. *Howe*, [1905] 2 K. B. 612.
Affirmed by H. L. (Sc.)
[1906] **A. C. 455**

—— *Elliott* v. *Crutchley* [1904] 1 K. B. 565
Affirmed by H. L. (E.) [1906] **A. C. 7**

—— *Erischen* v. *Last* - (1881) 8 Q. B. D. 414
Distinguished by P. C. COMMISSIONER OF TAXES FOR NEW ZEALAND *v.* EASTERN EXTENSION AUSTRALASIA AND CHINA TELEGRAPH COMPANY.
[1906] **A. C. 526**

—— *Garbutt* v. *Durham Joint Committee*, [1904] 1 K. B. 522, and C. A., [1904] 2 K. B. 514.
On one point reversed by H. L. (E.)
[1906] **A. C. 291**

—— *Hill* v. *Pannifer* - [1904] 1 K. B. 811
Overruled by H. L. (E.). COSTER *v.* HEADLAND - - [1906] **A. C. 286**

—— *Inverarity* v. *Forfarshire County Council*, (1904) 6 F. 553.
Affirmed by H. L. (Sc.)
[1906] **A. C. 354**

—— *Kilmalcolm Parish Council* v. *Glasgow Parish Council*, (1904) 6 F. 457.
Affirmed by H. L. (Sc.)
[1906] **A. C. 344**

—— *Kirkintilloch Parish Council* v. *Eastwood Parish Council*, (1902) 5 F. 274.
Approved by H. L. (Sc.). KILMALCOLM PARISH COUNCIL *v.* GLASGOW PARISH COUNCIL - [1906] **A. C. 344**

—— *Lewin* v. *End* - - [1905] 1 K. B. 669
Reversed by H. L. (E.)
[1906] **A. C. 299**

CASES *continued.*

—— *Reg.* v. *Grenier*, (1899) 30 Sup. Ct. Can. 42.
Overruled by P. C. MILLER *v.* CANADA GRAND TRUNK RAILWAY COMPANY [1906] A. C. 187

—— *Robinson* v. *Canadian Pacific Ry. Co.*, [1892] A. C. 481.
Followed by P. C. MILLER *v.* CANADA GRAND TRUNK RAILWAY COMPANY [1906] A. C. 187

—— *Ruben* v. *Great Fingall Consolidated*, [1904] 2 K. B. 712.
Affirmed by H. L. (E.) [1906] A. C. 439

—— *Saunders* v. *Newbold* - [1905] 1 Ch. 260
Affirmed by H. L. (E) *sub nom.* SAMUEL *v.* NEWBOLD - - [1906] A. C. 461

—— *Scholfield* v. *Londesborough* (*Earl*), [1896] A. C. 514.
Followed by P. C. COLONIAL BANK OF AUSTRALASIA, LD. *v.* MARSHALL [1906] A. C. 559

—— *Shaw* v. *Port Philip Gold Mining Co.*, (1884) 13 Q. B. D. 103.
Discussed by H. L. (E.). RUBEN *v.* GREAT FINGALL CONSOLIDATED [1906] A. C. 439

—— *Strong & Co., of Romsey, Ld.* v. *Woodifield*, [1905] 2 K. B. 350.
Affirmed by H. L. (E.) [1906] A. C. 448

—— *Sutherland* v. *Thomson* - (1902) 4 F. 957
Affirmed by H. L. (Sc.) [1906] A. C. 51

—— *Tait* v. *Macleay*, [1904] 2 Ch. 631.
Reversed by H. L. (E.) *sub nom.* MACLEAY *v.* TAIT - [1906] A. C. 24

—— *Underground Electric Railways Company of London, Ld.* v. *Inland Revenue Commissioners*, [1905] 1 K. B. 174.
Affirmed by H. L. (E.). [1906] A. C. 21

—— *Van Eijck* (*C. A.*) *and Zoon* v. *Somerville*, (1905) 7 F. 739.
Reversed by H. L. (Sc.) [1906] A. C. 489

—— *Watson* v. *Charlesworth*, [1905] 1 K. B. 74.
Affirmed by H. L. (E.) *sub nom.* CHARLESWORTH v. WATSON [1906] A C. 14

—— *White* (*J. & M.*) v. *White* (*J.*) *& Sons*, (1905) 42 S. L. R. 330. Reversed by H. L. (Sc.) [1906] A. C. 72

—— *Williams* v. *North's Navigation Collieries*, (1889) *Ld.* [1904] 2 K. B. 44.
Reversed by H. L. E. [1905] A. C. 136

CERTIFICATE—Land transfer—Wrongful issue of certificate of title - - - 503
See PRIVY COUNCIL APPEALS. 2.

—— Share certificate fraudulently issued by secretary—Forgery—Scope of employment - - - - - - 439
See COMPANY. 3.

CHARITY—Poor Law (Scotland)—Settlement by residence—Support by charitable institution- - - - - - 344
See POOR LAW.

CHEQUE — Banker and customer — Cheques drawn up with spaces, afterwards fraudulently filled up — Liability of bank—Negligence - - - - 559
See PRIVY COUNCIL APPEALS. 1.

COAL—Mines—Private coal fields—Royalties on coal extracted—Law of Natal - 511
See PRIVY COUNCIL APPEALS. 21.

COLLISION—Both ships at fault—Competency of re-opening the question of damage at the instance of the cargo owners - 489
See SHIPPING.

COLUMBIA—British Columbia—Laws of - 552
See PRIVY COUNCIL APPEALS. 8, 9.

COMPANY—*Life Assurance Company—Mutual Assurance—Policy-holder participating in Profits—Alteration of Regulations—Power of Company to alter Rights of Policy-holder.*

The respondent became a policy-holder in the participating branch of an assurance company upon the terms that he would abide by the deed of settlement, by-laws, and regulations of the company. After distributing the profits arising from that branch among the participating policy-holders for many years without deduction for a reserve fund the company proposed to alter that practice by devoting part of the profits to a reserve fund, and to alter the by-laws accordingly. By the deed of settlement the company had power to make alterations in the by-laws. The policy-holder having brought an action for an injunction against the company on the ground that he had taken his policy upon the faith of a prospectus which stated the practice :—

Held, that there was no contract between the company and the policy-holder not to alter their practice in the distribution of profits, and that the action could not be maintained.

The decision of the Court of Appeal, *Baily* v. *British Equitable Assurance Co.*, [1904] 1 Ch. 374, reversed. BRITISH EQUITABLE ASSURANCE COMPANY *v.* BAILY - - - H. L. (E.) 35

2. —— *Prospectus—Non-disclosure of Contracts—Directors' Liability—Proof of Damage—Waiver Clause—Companies Act*, 1867 (30 *&* 31 *Vict. c.* 131), *s.* 38.

To recover damages under s. 38 of the Companies Act, 1867, a plaintiff who has subscribed for shares on the faith of a prospectus which did not disclose a material contract must prove that he has sustained damage, and that if he had known of the undisclosed contract he would not have become a shareholder.

Where there is no fraud in fact and the non-disclosure is owing to an honest mistake, a subscriber for shares who has agreed to waive any fuller compliance with s. 38 than is contained in the prospectus cannot maintain an action for damages.

The decision of the Court of Appeal, *Tait* v. *Macleay* [1904] 2 Ch. 631, reversed on the above grounds MACLEAY *v.* TAIT - H. L. (E.) 24

COMPANY—*continued.*

3. —— *Share Certificate fraudulently issued by Secretary—Forgery—Master and Servant—Scope of Employment—Estoppel.*

The appellants advanced in good faith a sum of money to the secretary of the respondent company for his own purposes on the security of a share certificate of the company issued to them by the secretary certifying that the appellants were registered in the company's register of shareholders as transferees of shares. This certificate was, in point of form, in accordance with the company's articles of association, inasmuch as it bore the seal of the company, and appeared to be signed by two of the directors and countersigned by the secretary. The seal of the company was, however, affixed to it by the secretary fraudulently and without authority, and the signatures of the two directors were forged by him. In an action against the company for damages for refusing to register the appellants as owners of the shares :—

Held, that, in the absence of any evidence that the company ever held out the secretary as having authority in this behalf to do anything more than the mere ministerial act of delivering share certificates, when duly made, to the owners of shares, the company were not estopped by the forged certificate from disputing the claim of the appellants, or responsible to them for the wrongful action of their secretary.

Decision of the Court of Appeal, [1904] 2 K. B. 712, affirmed.

Shaw v. *Port Philip Gold Mining Co.*, (1884) 13 Q. B. D. 103, discussed. RUBEN *v.* GREAT FINGALL CONSOLIDATED - - **H. L. (E.) 439**

—— Directors—Purchase—Effect of resolution by an insufficient quorum—Laws of Canada - - - - - **196**
See PRIVY COUNCIL APPEALS. 14.

—— Income tax—Gas company—Standard rate of dividend - - - - - **10**
See REVENUE. 1.

—— Income tax—Income derived from business—Business carried on in the colony or profits received—Law of New Zealand **526**
See PRIVY COUNCIL APPEALS. 25.

—— Income tax — Nitrate grounds situate abroad—Profits and gains—Deduction
See REVENUE. 2. **18**

—— Income tax — "Residence" — Company registered abroad—Majority of directors in England - - - - - **455**
See REVENUE. 3.

COMPENSATION — Mines — Reservation of manorial rights—Right to support of surface—Damage to surface - **305**
See INCLOSURE ACT.

—— Workmen's compensation.
See under EMPLOYER AND WORKMAN.

CONSIDERATION — Payable on contingency — Stamp—Conveyance - - **21**
See REVENUE. 6.

CONSPIRACY — Discovery — Affidavit of documents—Criminal offence - - **434**
See PRACTICE.

CONTINGENCY — Consideration payable on — Stamp—Conveyance - - **21**
See REVENUE. 6.

CONTRACT—*Performance Impossible—Payment made "on Account of" Contract—Express Provision in the Event of no Expense being incurred—Refreshments.*

A caterer agreed to supply refreshments at a fixed price to the respondents on the occasion of a naval review to be held on a named day, "300*l.* to be paid to the caterer on account of the refreshments on the Monday previous to the review day," it being expressly stipulated that in the event of the cancellation of the review before any expense was incurred by the caterer there should be no liability on the respondents. A few days before the named day it was known that the review would not be held. The caterer had spent about 20*l.* in crockery, &c., but incurred no expense in providing refreshments. The caterer having sued the respondents upon a cheque for 300*l.* given by them to him in advance in accordance with the contract :—

Held, that upon the true construction of this particular contract the respondents were not liable in respect of refreshments, and could not be sued upon the cheque.

The decision of the Court of Appeal, [1904] 1 K. B. 565, affirmed. ELLIOTT *v.* CRUTCHLEY **H. L. (E.) 7**

—— Employer and workman.
See under EMPLOYER AND WORKMAN.

—— Husband and wife—Authority of wife to pledge husband's credit—Contract by wife "otherwise than as agent" **148**
See HUSBAND AND WIFE.

—— Inducing workmen to breach of contracts with employers—Strike—Trade union **384**
See EMPLOYER AND WORKMAN. 3.

—— Practice—New trial must be on motion—Law of British Honduras - - **515**
See PRIVY COUNCIL APPEALS. 6.

—— Prospectus—Non-disclosure of contracts—Directors' liability—Waiver clause **24**
See COMPANY. 2.

—— Railway — Contract, Construction of — "Whole operation of its railway"—Laws of Canada - - **100**
See PRIVY COUNCIL APPEALS. 7.

—— Railway contract—Penalty for non-completion of line—Liquidated damages—"Actual cost" - - - **368**
See PRIVY COUNCIL APPEALS. 18.

CONVEYANCE—Stamp—Consideration payable on contingency - - - **21**
See REVENUE. 6.

CORPORATION—Drain—Negligence — Liability of municipal authorities — Law of Victoria - - - - **105**
See PRIVY COUNCIL APPEALS. 30.

COSTS—"Actual cost" does not include interest on moneys expended — Railway contract - - - - - **368**
See PRIVY COUNCIL APPEALS. 18.

COSTS—*continued.*

—— Distress—Poor rate—Reasonable charges of taking, keeping and selling distress *See* RATES. 2. 286

COVENANT — Mining lease — Construction — Damages - - - - - 14 *See* MINE.

—— Restraint of trade. *See* under RESTRAINT OF TRADE.

CRIMINAL LAW — Practice — Discovery — Affidavit of documents — Conspiracy — Criminal offence - - - 434 *See* PRACTICE.

CROWN—Crown land in New Brunswick—Adverse possession for less than sixty years—Grant by the Crown during adverse possession valid - - 569 *See* PRIVY COUNCIL APPEALS. 10.

—— Foreshore—Railway company — Power of the Dominion to legislate for provincial Crown property — Laws of British Columbia - - - - - 204 *See* PRIVY COUNCIL APPEALS. 8.

—— Trespass—Title to foreshore under a Crown grant—Construction - - 92 *See* PRIVY COUNCIL APPEALS. 27.

DAMAGE AND DAMAGE — Company — Prospectus — Non-disclosure of contracts—Director's liability—Proof of damage—Waiver clause - - - - - 24 *See* COMPANY. 2.

—— Land Transfer—Wrongful issue of certificate of title - - - - - - 503 *See* PRIVY COUNCIL APPEALS. 2.

—— Liquidated Damages — Railway contract —Penalty for non-completion of line—"Actual cost" - - - 368 *See* PRIVY COUNCIL APPEALS. 18.

—— Mining lease—Construction—Covenant 14 *See* MINE.

—— Ship—Collision—Competency of re-opening the question of damage at the instance of the cargo owners - - - 489 *See* SHIPPING.

DEBT—Truck Acts — Deduction from wages—Set-off — Debt due from workman to employer - - - - - 136 *See* EMPLOYER AND WORKMAN. 4.

DIRECTOR—Prospectus—Non-disclosure of contracts — Director's liability — Waiver clause - - - - - - 24 *See* COMPANY. 2.

—— Purchase—Effect of resolution by an insufficient quorum — Laws of Canada 196 *See* PRIVY COUNCIL APPEALS. 14.

DISCOVERY — Affidavit of documents — Conspiracy—Criminal offence - - 434 *See* PRACTICE.

DISMISSAL — Action for wrongful dismissal—Duty of the trial judge — New trial ordered - - - - - - 122 *See* PRIVY COUNCIL APPEALS. 24.

DISTRESS—Expenses of—Poor rate—Reasonable charges of taking, keeping and selling distress - - - - - 286 *See* RATES. 2.

DISUSED BURIAL GROUNDS ACTS. *See* under BURIAL.

DIVIDEND—Income tax—Gas company—Standard rate of dividend - - 10 *See* REVENUE. 1.

DOCUMENTS — Affidavit of — Discovery—Conspiracy—Criminal offence - - 434 *See* PRACTICE.

DOMICIL—*Acquisition of Domicil—Intention—Legitim—Scottish Law.*

The abandonment or change of a domicil is a proceeding of a very serious nature, and an intention to make such an abandonment must be proved by satisfactory evidence.

A person having a domicil of origin in England does not lose it and acquire a Scottish domicil by making his home in Scotland for many years, unless in the circumstances his doing so clearly shews his intention to abandon his original domicil.

The testator, whose domicil of origin was in England, had his chief residence or home in Scotland for thirty years prior to his death. During this time he retained his interests in England as principal partner in a private bank at Manchester, and as proprietor of large landed estates, and continued his occupancy as tenant of a mansion house near Manchester and of a house in London. He left very large personal estate and a will in English form, made a short time before his death, in which he was designated as of Manchester. He also made a will in Scottish form. Apart from making his home in Scotland there was nothing in his conduct to suggest any intention of abandoning his English domicil :—

Held, affirming the decision of the First Division of the Court of Session, that he had not lost his English domicil. MARCHIONESS OF HUNTLY *v.* GASKELL - - H. L. (Sc.) 56

DOMINION ACT — Power of Dominion Parliament—Power to expel and deport aliens —Law of Canada - - - 542 *See* PRIVY COUNCIL APPEALS. 12.

DRAINS. *See* under SEWERS.

DUTY—Public Revenue. *See* under REVENUE.

EJECTMENT—Injunction—Mortgage—Power of attorney—Laws of Turks and Caicos Islands - - - - - - 254 *See* PRIVY COUNCIL APPEALS. 29.

EMPLOYER AND WORKMAN—*Accident—Compensation—"Serious and wilful misconduct"—Master and Servant—Workmen's Compensation Act*, 1897 (60 & 61 *Vict. c.* 37).

A workman was found fatally injured in a lift on his employers' premises without a load. Upon the lift was a notice that no one was allowed to use it except in charge of a load. There was no evidence as to the circumstances

EMPLOYER AND WORKMAN—*continued.*
under which the workman entered the lift. In an application for compensation by the widow :—

Held, that the burden of proving that the workman was guilty of "serious and wilful misconduct" within the meaning of the Workmen's Compensation Act lay upon the employers; that there was no evidence of serious and wilful misconduct within the meaning of the Act; and that the applicant was entitled to compensation.

The meaning of "serious and wilful misconduct" discussed. JOHNSON (PAUPER) *v.* MARSHALL, SONS & CO., LIMITED - **H. L. (E.) 409**

2. —— *Employment "on or in or about an Engineering Works"—Work ancillary to Engineering Work—Workmen's Compensation Act*, 1897 (60 *&* 61 *Vict. c.* 37), *s.* 7.

A workman in the service of the respondents, who had contracted to take up the rails of horse tramways in a town and lay down rails for electric tramways, while employed in unloading and stacking rails for the new tramways in a railway yard, was injured by an accident. The rails had been brought by the railway, and the contractors were allowed by the railway company to use the yard for the storage of the rails till they were required for the tramways. At the time of the accident the only work then begun under the contract was the taking up rails in a street about 700 yards from the railway yard :—

Held, by Lords Davey, Robertson, and Atkinson (Lord Loreburn, L.C. and Lord James of Hereford dissenting), that the workman was not at the time of the accident employed "on or in or about an engineering works" within the meaning of the Workmen's Compensation Act, 1897, s. 7.

The decision of the Court of Appeal, [1905] 2 K. B. 148, affirmed. BACK (PAUPER) *v.* DICK KERR & CO. - - - - - **H. L. (E.) 325**

3. —— *Inducing Workmen to Breach of Contracts with Employers—Strike—Principal and Agent — Trade Union — Authority of Branch Officials to bind Union—Ratification.*

Where workmen strike in breach of their contracts those who help to maintain the strike by money and counsel are not liable to pay damages to the employers merely because losses are thereby caused to the employers.

A trade union having been sued for damages on the ground that workmen had been induced to break their contracts with their employers by officials of the union, and that the union had ratified and adopted the acts of their officials :—

Held, that the union was not liable, those who procured the strike not having been authorised by the rules or by the action of the union. DENABY AND CADEBY MAIN COLLIERIES, LIMITED *v.* YORKSHIRE MINERS' ASSOCIATION **H. L. (E). 384**

4. —— *Truck Acts—Deduction from Wages —Set-off—Debt due from Workman to Employer —Truck Act*, 1831 (1 *&* 2 *Will.* 4, *c.* 37), *s.* 3.

The Truck Act, 1831, does not allow an employer when paying wages to a workman to make any deductions except those expressly sanctioned by the Act. Therefore he cannot deduct money which a Court of summary

EMPLOYER AND WORKMAN—*continued.*
jurisdiction has ordered the workman to pay to the employer in respect of breaches of contract to work.

The decision of the Court of Appeal, [1904] 2 K. B. 44, reversed. WILLIAMS *v.* NORTH'S NAVIGATION COLLIERIES (1889) LIMITED **H. L. (E.) 136**

—— Company — Share certificate fraudulently issued by secretary—Forgery—Scope of employment - - - - - **439**
See COMPANY. 3.

—— Contract that deceased shall have no claim — "Satisfaction" means real and tangible indemnity — Laws of Canada - - - - - - **187**
See PRIVY COUNCIL APPEALS. 15.

"ENGINEERING WORK"—Workmen's compensation - - - - - - **325**
See EMPLOYER AND WORKMAN. 2.

ESTOPPEL—Company—Share certificate fraudulently issued by secretary—Forgery—Scope of employment - - - **439**
See COMPANY. 3.

EVIDENCE—Foreshore, title to, under a Crown grant—Improper rejection of evidence —Acts of user before the grant admissible - - - - - - - **92**
See PRIVY COUNCIL APPEALS. 27.

—— Will, Validity of — Undue influence — Evidence of executors inadmissible—Laws of Jersey - - - - **169**
See PRIVY COUNCIL APPEALS. 20.

EXCISE — Australia — Power of the Commonwealth Parliament to impose an excise duty to take effect from the date of the minister's proposal - - - **360**
See PRIVY COUNCIL APPEALS. 5.

EXECUTOR—Will, Validity of—Undue influence —Evidence of executors inadmissible—Laws of Jersey - - - - **169**
See PRIVY COUNCIL APPEALS. 20.

FACTORY—Poor rate—Rating of factory with machinery - - - - - **43**
See RATES. 3.

FINANCE ACTS.
See under REVENUE.

FISHERY—*Salmon Fishing—Impeding Passage of Fish by Abstraction of Water.*

Interference with the free passage of salmon up a river is a wrong against the proprietors of the upper fisheries, and if it materially obstructs the passage of fish can be restrained by interdict.

In 1882 mill owners on the Don river, which is a salmon river, increased their diversion of the water from its natural channel into artificial channels serving the uses of their mill. This was done to such an extent as to leave the natural channel in the neighbourhood of the mill at times bare of water. In 1900 the proprietors of the salmon fisheries in the upper reaches of the river objected to the mill owners' diversion of the water, and asked for an interdict.

Held (affirming the decision of the First Division of the Court of Session, (1904) 5 F.

FISHERY—*continued.*
818), that they were entitled to an interdict. ALEX. PIRIE & SONS, LIMITED *v.* KINTORE (EARL) (ET È CONTRA) - - H. L. (Sc.) 478

FORESHORE—Railway company—Power of the Dominion to legislate for provincial Crown property — Laws of British Columbia - - - - - - 204
See PRIVY COUNCIL APPEALS. 8.

—— Trespass—Title to foreshore under a Crown grant—Construction - - - - 92
See PRIVY COUNCIL APPEALS. 27.

FORGERY—Company—Share certificate fraudulently issued by secretary—Scope of employment - - - - - 439
See COMPANY. 3.

FRAUD—Banker and customer—Cheques drawn with spaces, afterwards fraudulently filled up—Liability of bank—Negligence - - - - - - - 559
See PRIVY COUNCIL APPEALS. 1.

—— Company — Share certificate fraudulently issued by secretary — Forgery — Scope of employment - - - - - 439
See COMPANY. 3.

GAS — Income tax — Gas company — Standard rate of dividend - - - - - 10
See REVENUE. 1.

HERITAGE—Right in security—Messenger-at-arms - - - - - - - 51
See SCOTTISH LAW. 2.

HOTEL—Income tax—Deductions—Loss arising from negligence — Injury to guest — Damages - - - - - - 448
See REVENUE. 4.

HOUSE—Part of a house or other building or manufactory, Prohibition against the compulsory acquisition of a—Laws of New South Wales - - - - 249
See PRIVY COUNCIL APPEALS. 22.

HUSBAND AND WIFE—*Principal and Agent—Authority of Wife to Pledge Husband's Credit—Goods supplied on order of Wife—Contract by Wife "otherwise than as Agent" — Married Women's Property Act*, 1893 (56 & 57 *Vict. c.* 63), *s.* 1—*Rules of Supreme Court, Order* LVIII., *r.* 4.
The respondent, a married woman living with her husband, ordered articles of dress from the appellants with her husband's express authority and gave the appellants her married name. In an action by the appellants against the respondent for the price the jury could not agree upon the question whether the appellants knew that she was a married woman, and the learned judge entered judgment for the appellants. The Court of Appeal reversed that decision and entered judgment for the respondent on the ground that there was no evidence that she had contracted "otherwise than as agent" so as to bring the case within the Married Women's Property Act, 1893 :—
Held, affirming the decision of the Court of Appeal, by Lord Loreburn, L.C. and Lord Macnaghten (Lords Robertson and Atkinson dissenting), that it was immaterial whether the appellants did or did not know that the respondent was a married woman, she having as a matter of fact contracted as agent for her husband, and that the respondent was not liable. PAQUIN, LIMITED *v.* BEAUCLERK (FORMERLY HOLDEN) - - - - - H.L. (E.) 148

—— Unfurnished house—Defective premises—Personal injury to tenant's wife—Landlord not liable - - - - - 428
See LANDLORD AND TENANT.

INCLOSURE ACT — *Construction of — Mines — Reservation of Manorial Rights—Right to support of Surface—Damage to Surface—Compensation.*
Before 1757 the lord of a manor had the right to work mines and minerals under the waste lands of the manor so as to let down the surface, providing enough pasturage was left to satisfy the rights of the commoners. By an inclosure Act of 1757 the waste lands were enclosed and allotted, and the lord of the manor was empowered to work the mines and minerals under the allotments as fully and freely as he might have done if the Act had not passed, and that without making or paying any satisfaction for so doing. A compensation clause in the Act provided that any damage done to an allottee by the exercise of the powers reserved to the lord should be paid for by an assessment upon the occupiers of the other allotments :—
Held, that upon the true construction of the Act, the common law right of the surface owners to the support of the surface was not taken away by express words or necessary implication.
The decision of the Court of Appeal, [1904] 2 Ch. 419, affirmed. BUTTERKNOWLE COLLIERY COMPANY *v.* BISHOP AUCKLAND INDUSTRIAL CO-OPERATIVE COMPANY - - H. L. (E) 305

INCOME TAX.
See under REVENUE.

INDEMNITY — Employer and workman — "Satisfaction" means real and tangible indemnity—Laws of Canada - 187
See PRIVY COUNCIL APPEALS. 15.

INDIA—Laws of - - - - - - 212
See PRIVY COUNCIL APPEALS. 19.

INFRINGEMENT—Patent.
See under PATENT.

INJUNCTION—Ejectment — Mortgage — Power of attorney—Laws of Turks and Caicos Islands - - - - - - 254
See PRIVY COUNCIL APPEALS. 29.

—— Trespass, Action for—Arbitration clause—Failure of company to proceed under their Act—Law of Canada - - 110
See PRIVY COUNCIL APPEALS. 13.

INSURANCE, LIFE—Policy-holder participating in profits—Power of company to alter rights of policy-holders - - - 35
See COMPANY. 1.

INSURANCE, MARINE — *Policy effected by Owner of Ship for all Persons to whom the*

INSURANCE, MARINE—*continued.*

Subject-matter might appertain—Right of Charterer to Benefit of Policy—Ratification.

The appellants chartered a ship from the owners. Brokers, instructed by the owners' agents, effected with the respondents a policy of insurance on the ship, "as well in their own name as for and in the name and names of all and every other person or persons to whom the subject-matter of this policy does may or shall appertain in part or in all." The policy contained a collision clause. The appellants, having been compelled to pay damages to the owners of another vessel for a collision between the two ships, sued the respondents on the policy There being no evidence of any intention by the owners to insure on behalf of the appellants :—

Held, that the appellants were not entitled to sue on the policy.

The decision of the Court of Appeal, [1905] 1 K. B. 637, affirmed. BOSTON FRUIT COMPANY *v.* BRITISH AND FOREIGN MARINE INSURANCE COMPANY - - - - - - **H. L. (E.) 336**

INTEREST—Money-lenders.
See under MONEY-LENDER.

—— On payments in arrear—Practice—Law of Ontario - - - - - - **117**
See PRIVY COUNCIL APPEALS. 11.

Jersey—Laws of - - - - - - - **169**
See PRIVY COUNCIL APPEALS. 20.

JURISDICTION—Money-lender.
See under MONEY-LENDER.

JUSTIFICATION—Plea of—Action for wrongful dismissal—Duty of the trial judge—New trial ordered - - - - **122**
See PRIVY COUNCIL APPEALS. 24.

LAND—Crown land in New Brunswick—Grant by Crown during adverse possession valid—Rights of grantee - - **569**
See PRIVY COUNCIL APPEALS. 10.

—— Land in British Columbia—Military reserve. **552**
See PRIVY COUNCIL APPEALS. 9.

LAND TRANSFER — Western Australia Law Transfer Act—Liability of Registrar of Titles - - - - - - - - **503**
See PRIVY COUNCIL APPEALS. 2.

LANDLORD AND TENANT—*Unfurnished House—Defective Premises—Promise by Landlord to Repair—Personal Injury to Tenant's Wife—Landlord not Liable.*

The owner of a dilapidated house contracted with his tenant to repair it, but failed to do so. The tenant's wife, who lived in the house and was well aware of the danger, was injured by an accident caused by the want of repair :—

Held, that the wife being a stranger to the contract, had no claim for damages against the owner.

The decision of the Court of Appeal, [1905] 2 K. B. 757, affirmed. CAVALIER (PAUPER) *v.* POPE - - - - - - **H. L. (E.) 428**

LEASE—Mining lease — Construction — Covenant—Damages - - - - - **14**
See MINE.

LEGITIM—Domicil, Acquisition of—Intention—Scottish law - - - - - **56**
See DOMICIL.

LETTERS PATENT.
See under PATENT.

LIFE INSURANCE.
See under INSURANCE, LIFE.

LIGHT AND AIR—"Building"—Open space—Screen to prevent acquisition of right to light - - - - - - - **1**
See BURIAL.

LOCAL AUTHORITY—Tramways, Sale of, within a district — Buildings outside the district - - - - - - - - **277**
See TRAMWAYS.

LONDON—"Building"—Burial ground—Screen to prevent acquisition of right to light. **1**
See BURIAL.

—— Rates—Assessments—Composition in lieu of rates—Statutory exemption - **263**
See RATES. 1.

MACHINERY—Poor rate—Rating of factory with machinery - - - - - **43**
See RATES. 3.

MANOR—Mines—Reservation of manorial rights —Right to support of surface—Damage —Compensation - - - - - **305**
See INCLOSURE ACT.

MARINE INSURANCE.
See under INSURANCE, MARINE.

MARRIED WOMAN.
See under HUSBAND AND WIFE.

MASTER AND SERVANT.
See under EMPLOYER AND WORKMAN.

MERCHANT SHIPPING.
See under SHIPPING.

MESSENGER-AT-ARMS — Heritage — right in security - - - - - - - - **51**
See SCOTTISH LAW. 2.

METROPOLIS.
See under LONDON.

MILITARY RESERVE—Land in British Columbia - - - - - - - - - **552**
See PRIVY COUNCIL APPEALS. 9.

MILLOWNERS — Riparian proprietors, Rights of—Abstraction of the whole of the water from river—Ex adverso millowners - - - - - - - - **72**
See RIVER.

MINE—*Mining Lease—Construction—Covenant to Win, Work and Get Fairly, Duly and Honestly the Whole of the Coal—Damages.*

By a mining lease a seam of coal under land of the lessors was demised for a term of years at an annual rent, and until the working began at a nominal dead rent, and the lessees covenanted that they would at all times during the term fairly, duly, and honestly win, work and get the whole of the seam in a proper and workmanlike

MINE—*continued.*
manner. Owing to difficulties in working it was found to be impossible to work the coal without heavy pecuniary loss, and the lessees therefore abandoned the undertaking :—
Held, that upon the true construction of this particular lease the lessees had broken their covenant, and were liable in damages to the lessors.
The decision of the Court of Appeal, *Watson* v. *Charlesworth*, [1905] 1 K. B. 74, affirmed. CHARLESWORTH *v.* WATSON - **H. L. (E.) 14**

—— Private coal fields—Royalties on coal extracted—Law of Natal - - **511**
See PRIVY COUNCIL APPEALS. 21.

—— Support of surface, Right to—Damage to surface — Compensation — Reservation of manorial rights - - **305**
See INCLOSURE ACT.

MONEY-LENDER — *Borrower — Loan Transaction—Absence of Risk—Exorbitant Interest—"Harsh and Unconscionable"—Jurisdiction—Policy of Act—Relief—Money-lenders Act*, 1900 (63 *&* 64 *Vict. c.* 51), *s.* 1.
The relief which the Money-lenders Act, 1900, extends to a borrower is not limited to cases in which before the Act the Court of Chancery would have given relief.
The policy of the Act is to enable the Court to prevent oppression, leaving it in the discretion of the Court to weigh each case upon its own merits and to look behind a class of contracts which peculiarly lend themselves to an abuse of power.
Decision of the Court of Appeal, *Saunders* v. *Newbold*, [1905] 1 Ch. 260, affirmed. SAMUEL *v.* NEWBOLD - - - - **H. L. (E.) 461**

MORTGAGE—Appeal—Right of appeal to the King in Council—Suits to enforce and redeem a mortgage—Laws of India **212**
See PRIVY COUNCIL APPEALS. 19.

NATAL—Laws of - - - - **511**
See PRIVY COUNCIL APPEALS. 21.

NEGLIGENCE — Cheques drawn with spaces, afterwards fraudulently filled up — Liability of bank - - - **559**
See PRIVY COUNCIL APPEALS. 1.

—— Drain—Liability of municipal authorities —Law of Victoria - - **105**
See PRIVY COUNCIL APPEALS. 30.

NEW BRUNSWICK—Laws of - - **569**
See PRIVY COUNCIL APPEALS. 10.

NEWFOUNDLAND—Laws of - - **132**
See PRIVY COUNCIL APPEALS. 26.

NEW SOUTH WALES—Laws of - **249, 378**
See PRIVY COUNCIL APPEALS. 22, 23.

NEW ZEALAND—Laws of - - **122, 526**
See PRIVY COUNCIL APPEALS. 24, 25.

NITRATE GROUNDS—Situate abroad—Income tax—Deduction - - - **18**
See REVENUE. 2.

ONTARIO—Laws of - . **110, 117, 542**
See PRIVY COUNCIL APPEALS. 11—13.

OPEN SPACE—Screen to prevent acquisition of right to light—"Building" - **1**
See BURIAL.

PARTNERSHIP — Purchase by two partners without the knowledge of the third—Suits for an account—Scope of partnership - - - - - **494**
See PRIVY COUNCIL APPEALS. 28.

PASSAGE—Salmon fishing—Impeding passage of fish by abstraction of water - **478**
See FISHERY.

PATENT—*Letters Patent — Construction — Infringement — "Exercise and Vend" — Sale in England—Delivery Abroad.*
Where a contract is made in the United Kingdom to sell patented goods which are abroad, and is completed by appropriation or delivery abroad, the vendor does not use, exercise or vend the invention in the United Kingdom within the meaning of the patent.
Decision of the Court of Appeal, [1905] 2 Ch. 495, affirmed. BADISCHE ANILIN UND SODA FABRIK *v.* HICKSON - **H. L. (E.) 419**

PAYMENTS—Interest on payments in arrear—Law of Ontario - - - **117**
See PRIVY COUNCIL APPEALS. 11.

PENALTY—Liability to—Laws of New South Wales - - - - - **378**
See PRIVY COUNCIL APPEALS. 23.

—— Railway contract—Penalty for non-completion of line—Liquidated damages **368**
See PRIVY COUNCIL APPEALS. 18.

PENSION—Police—"Approved service"—Continuity of service - - - **291**
See POLICE.

—— Police pension society—Claim under the rules by policeman obliged to resign—Law of Quebec. - - - **535**
See PRIVY COUNCIL APPEALS. 16.

PLEDGE—Authority of wife to pledge husband's credit—Contract by wife "otherwise than as agent" - - - **148**
See HUSBAND AND WIFE.

POLICE—*Pension —"Approved Service" — Continuity of Service—Character of Service—Certificate of Chief Constable—Evidence to Contradict Certificate—Police Act*, 1890 (53 *&* 54 *Vict. c.* 45), *ss.* 1, 4.
The "approved service" for not less than twenty-five years required by the Police Act, 1890, s. 1, to entitle a constable to a pension on retirement need not be continuous service.
The decisions of the King's Bench Division, [1904] 1 K. B. 522, and of the Court of Appeal, [1904] 2 K. B. 514, on this point reversed.
A certificate of "approved service" under s. 4, sub-s. 1, of the Act, that is, of diligent and faithful service, must be under the order of the police authority. A certificate signed by the chief officer of a police force under s. 4, sub-s. 2, is a certificate of the period of the service, not of its character. GARBUTT (PAUPER) *v.* DURHAM JOINT COMMITTEE. - - **H. L. (E.) 291**

POLICE—*continued.*

—— Police pension society—Claim under the rules by a policeman obliged to resign —Law of Quebec - - - - **535**
See PRIVY COUNCIL APPEALS. 16.

POLICY—Life insurance.
See under INSURANCE, LIFE.

—— Marine insurance.
See under INSURANCE, MARINE.

POOR LAW—*Settlement by Residence—Maintenance without Recourse to common Begging or Receipt of or Application for Parochial Relief—Support by Charitable Institution—Bodily and Mental Unfitness for Self-maintenance—Poor Law (Scotland) Act*, 1898 (61 & 62 *Vict. c.* 21), *s.* 21.

Under s. 1 of the Poor Law (Scotland) Act, 1898, which enacts that "no person shall be held to have acquired a settlement in any parish in Scotland by residence therein unless such person shall . . . . have resided for three years continuously in such parish and shall have maintained himself without having recourse to common begging . . . . and without having received or applied for parochial relief":—

Held, that a person who had for three years continuously resided in a charitable institution in the appellant parish, and during that period had not had recourse to common begging and did not apply for parochial relief, had acquired a residential settlement, and that the fact that during the whole time of her residence she suffered from mental weakness and chronic physical disease, which made her incapable of maintaining herself, did not take her out of the enactment.

Kirkintilloch Parish Council v. *Parish Council of Eastwood*, (1902) 5 F. 274, approved.

Judgment of the Second Division of the Court of Session, Scotland, (1904) 6 F. 457, affirmed. KILMALCOLM PARISH COUNCIL *v.* GLASGOW PARISH COUNCIL **H. L. (Sc.) 344**

POOR RATE.
See under RATES.

POWER OF ATTORNEY—Ejectment—Injunction — Mortgage — Laws of Turks and Caicos Islands - - - - **254**
See PRIVY COUNCIL APPEALS. 29.

PRACTICE—*Discovery—Affidavit of Documents—Conspiracy—Criminal Offence.*

In an action for damages for a conspiracy to induce workmen to break their contracts with the plaintiff the defendant cannot refuse to discover the material documents on the ground that they may tend to incriminate him. NATIONAL ASSOCIATION OF OPERATIVE PLASTERERS *v.* SMITHIES - - - **H. L. (E.) 434**

—— New trial ordered—Action for wrongful dismissal—Duty of the trial judge **122**
See PRIVY COUNCIL APPEALS. 24.

—— Appeal admitted by the Supreme Court dismissed as incompetent—Special leave to appeal refused - - - - **132**
See PRIVY COUNCIL APPEALS. 26.

PRACTICE—*continued.*

—— Appeal—Right of appeal to the King in Council—Mortgage—Laws of India **212**
See PRIVY COUNCIL APPEALS. 19.

—— Appeal—Special leave to appeal—Law of Australia - - - - **381, 548**
See PRIVY COUNCIL APPEALS. 3, 4.

—— Interest on payments in arrear—Law of Ontario - - - - - **117**
See PRIVY COUNCIL APPEALS. 11.

—— Trial—New trial must be on motion—Law of British Honduras - - - **515**
See PRIVY COUNCIL APPEALS. 6.

PRESCRIPTION—Street—Cost of improvements —Assessment—Laws of Canada - **241**
See PRIVY COUNCIL APPEALS. 17.

PRINCIPAL AND AGENT—Husband and wife —Authority of wife to pledge husband's credit—Contract by wife "otherwise than as agent" - - - - **148**
See HUSBAND AND WIFE.

—— Strike—Trade union—Authority of branch officials to bind union — Ratification **384**
See EMPLOYER AND WORKMAN. 3.

PRIVY COUNCIL APPEALS—AUSTRALIA—*Banker and Customer—Cheques drawn with Spaces, afterwards fraudulently filled up—Liability of Bank—Duty of Customer—Negligence.*

Held, that the mere fact that a cheque is drawn with spaces which can be utilized for the purpose of fraudulent alteration is not by itself any violation of duty by the customer to his banker.

Five cheques were drawn on the defendant bank by the two plaintiffs and defendant M. to the debit of their joint account. After they were signed by the plaintiffs, M. enhanced their apparent amounts by adding words and figures in the blank spaces to the left of those originally written.

In a suit to recover the balance of account the bank claimed to debit it with the enhanced amounts of the cheques, and the jury found that the bank could not, by the exercise of ordinary care and caution, have avoided paying the cheques as altered, and that the cheques were drawn by the plaintiffs in neglect of their duty to the bank:—

Held (affirming the High Court), that there was no evidence of negligence on the part of the respondents proper to be left to the jury.

Scholfield v. *Londesborough* (*Earl*), [1896] A. C. 514, followed. COLONIAL BANK OF AUSTRALASIA, LIMITED *v.* MARSHALL - **P. C. 559**

2. —— *Land Transfer—Western Australia Land Transfer Act*, 1874—*Land Transfer Act*, 1893, *s.* 211—*Wrongful issue of Certificate of Title — Liability of Registrar of Titles — Damages.*

By deed of feoffment in 1841 the land in suit was effectually conveyed to trustees in trust for M., her heirs and assigns, to hold unto the trustees, their heirs and assigns for ever, upon

PRIVY COUNCIL APPEALS—AUSTRALIA—*continued.*

certain special trusts directed to secure M.'s separate enjoyment during coverture and her testamentary power of appointment :—

Held that, on the true construction of this deed, the trustees, having regard to the habendum clause, took a legal estate in fee ; that under the general trust M. took an equitable estate in fee, the special trusts not being in any way inconsistent with, but rather ancillary to it ; and that after her coverture ceased M., being sui juris, was competent to convey it.

Held accordingly, in a suit by the appellant as trustee and beneficiary under a deed of marriage settlement executed in 1846 by her in favour of her intended second husband for life, with remainders which, on his death, took effect, that he was entitled to claim against the respondent for deprivation of title in respect of a certificate of title wrongfully issued to F. under the provisions of the Western Australia Transfer of Land Act, 1874.

It appearing that F. derived title under what purported to be an absolute conveyance in 1848 of the land in suit by the feoffor and feoffees of the deed of 1841 and their mortgagee, and by the then trustees of the deed of 1846 and by the husband, who covenanted for title as if he were vendor :—

Held, that the suit must be decreed, for the interests in remainder were unaffected by the conveyance, and consequently F. had, after the husband's death, no beneficial interest in the fee simple conveyed.

Held, further, that the trustees' right to sue accrued on the husband's death, and that, therefore, the suit was not barred by s. 211 of the Transfer of Land Act of 1893. SPENCER *v.* REGISTRAR OF TITLES - - - **P. C. 503**

3. —— *Practice—Special Leave to Appeal—Decree of High Court of Australia.*

Where on a petition of special leave to appeal from the High Court of Australia it appeared that the law as laid down by that Court could not be objected to :—

Held, that the question of the application of that law to the particular case involving simply the construction of a document, however substantial as between the parties, was not one of public importance, and that there was no sufficient ground shewn for granting the petition. WILFLEY ORE CONCENTRATOR SYNDICATE, LIMITED *v.* N. GUTHRIDGE, LIMITED **P. C. 548**

4. —— *Practice—Special leave to Appeal from High Court of Australia.*

Where petitioners for special leave have elected to appeal to the High Court of Australia, from which it is known that there is no further appeal without special leave, their Lordships will not, except in a very special case, entertain their petition.

Clergue v. *Murray*, [1903] A. C. 521 (where the same rule was laid down in reference to the Supreme Court of Canada), followed. VICTORIAN RAILWAY COMMISSIONERS *v.* BROWN. *Ex parte* VICTORIAN RAILWAY COMMISSIONERS - **P. C. 381**

5. —— *Queensland — Power of the Commonwealth Parliament—Power to impose an*

PRIVY COUNCIL APPEALS AUSTRALIA—*continued.*

Excise Duty to take effect from the Date of the Minister's Proposal—Commonwealth Acts, Nos. 11 *and* 14 *of* 1902—*Constitution Act* (63 & 64 *Vict.* (*Imperial*) *c.* 12), *ss.* 51, 90—*Construction—Law of Australia.*

On July 26, 1902, Excise Tariff, 1902 (No. 11), was passed by the Commonwealth Parliament, imposing certain uniform duties of excise, including a duty on manufactured sugar, the produce of Australia, as from October 8, 1901, the day on which the Minister had moved a resolution to that effect in Committee of Ways and Means of the House of Representatives.

On October 16, 1902, the Customs Tariff, 1902 (No. 14), was passed, which imposed uniform duties of customs as from the same date.

In a suit by the appellants to recover back excise duties on manufactured sugar collected from them between October 8, 1901, and July 26, 1902, on the grounds (1.) that it was ultra vires of the Commonwealth Parliament to impose them until the actual imposition of uniform customs duties ; (2.) that the duties were imposed in a manner which discriminated between States :—

Held, that Excise Tariff, 1902, was intra vires of the Commonwealth Parliament under the true construction of the material sections of the Constitution Act (63 & 64 Vict. c. 12). Neither s. 90 of that Act nor any other section expressly or impliedly prohibited the imposition of uniform excise duties previously to that of uniform customs duties. After that event the power to impose excise duties was exclusively vested in the Commonwealth, and the power of the States in that respect ceased. Under s. 51 Parliament has power, in accordance with the usual practice, to impose the duties as from the date of the resolution (s. 4 of Excise Tariff, 1902) :—

Held, also, that s. 5 of Excise Tariff, 1902, which allowed an exemption in the case of goods on which customs or excise duties had been paid under State legislation before October 8, 1901, is not a discrimination between States within the meaning of s. 51 of the Constitution Act, but is applicable to all the States alike, for a purpose which was temporary and necessary. COLONIAL SUGAR REFINING COMPANY *v.* IRVING - **P. C. 360**

6. —— **BRITISH HONDURAS**—*Practice—New Trial must be on Motion—Judgment, in the absence of New Trial, must be entered according to the Findings—Construction of Contract—Breach—Repudiation—Consolidated Laws of British Honduras, Part VI., c.* 13, *s.* 213.

Consolidated Laws of British Honduras, Part VI., c. 13, s. 213, which prescribes that a new trial must be applied for by motion within a specified period after the trial, is imperative, and in appeal from judgment entered after verdict their Lordships have no power to relax or dispense with it :—

Held, in such appeal, that, as no such motion had been made, no contention directed to a new trial was open to the appellants, and that consequently all questions as to a miscarriage of the trial, or as to any point having been wrongfully left to the jury, or as to misdirection, improper admission of evidence, or as to the correctness of the findings were excluded ; and that the only

PRIVY COUNCIL APPEALS—BRITISH HONDURAS—*continued.*

question open was whether the judgment in favour of the respondent was justified by the findings.

Held, also, that as the question in this case as to the breach of the contract sued upon going to the root thereof so as to entitle the respondent to repudiate it depended upon the construction of a written document, the judge was right in deciding it himself, and a finding of the jury on the point was not necessary. GEORGE D. EMERY COMPANY *v.* WELLS - - - - **P. C. 515**

7. —— **CANADA**—*Contract—Construction of —"Whole Operation of its Railway"—Limits to Whole Operation—Civil Code of Lower Canada, art.* 1018.

By art. 1018 of the Civil Code of Lower Canada, "all the clauses of a contract are interpreted the one by the other, giving to each the meaning derived from the entire act."

The appellant company having contracted with the respondent city to pay annually certain specified percentages on the total amount of their gross earnings arising from the whole operation of their railway, and it appearing from the rest of the contract that the city considered territories of outside municipalities were not included within and that it could only deal with streets within its jurisdiction, and that the company had to make separate arrangements with outside municipalities in respect of the operation of the railway within their limits :—

Held, that by the true construction of the contract the city was only entitled to percentages on the gross earnings arising from the whole operation of the lines within its own limits. MONTREAL STREET RAILWAY COMPANY *v.* CITY OF MONTREAL - - - **P. C. 100**

8. —— *British Columbia — British North America Act*, 1867, *ss.* 91, 92, 108—*Power of the Dominion to legislate for Provincial Crown Property—Dominion Act*, 1881 (44 *Vict. c.* 1), *s.* 18 (*a*) —*Provincial Foreshore—Railway Company.*

Sect. 108 of the British North America Act, 1867, empowers the Dominion Parliament to legislate for any land, including foreshore, which is proved to form part of a public harbour. Sects. 91 and 92, read together, empower the Dominion to dispose of provincial Crown lands, and therefore of a provincial foreshore, for the purposes of the respondent railway, which is a trans-continental railway connecting several provinces :—

Held, that s. 18 (*a*) of the respondents' incorporating Dominion Act (44 Vict. c. 1) is not controlled by the Consolidated Railway Act, 1879, and applies to provincial as well as Dominion Crown lands. Power given thereunder to appropriate the foreshore in question includes a power to obstruct any rights of passage previously existing across it. ATTORNEY-GENERAL FOR BRITISH COLUMBIA *v.* CANADIAN PACIFIC RAILWAY COMPANY - - - - **P. C. 204**

9. —— *Land in British Columbia—Military Reserve — Title of the Dominion — Transfer by Imperial Government—British North America Act*, 1867, *ss.* 108, 117.

The land in suit, called Deadman's Island, was de facto a "reserve" by the Government of

PRIVY COUNCIL APPEALS—CANADA—*contd.*

British Columbia under paragraph 3 of the Proclamation of 1859, and according to the evidence a military reserve :—

Held, that it remained Imperial property at the time of the British North America Act, 1867, and was transferred to the Dominion by special grant dated March 27, 1884. It did not, therefore, fall to the Colony in virtue of s. 117 of the Act, nor to the Dominion in virtue of s. 108. ATTORNEY-GENERAL OF BRITISH COLUMBIA *v.* ATTORNEY-GENERAL OF CANADA. **P. C. 552**

10. —— *New Brunswick — Crown Land in New Brunswick—Adverse Possession for less than Sixty Years—Grant by the Crown during adverse Possession valid—Rights of Grantee*—21 *Jac.* 1, *c.* 14—*Construction.*

In an action of ejectment it appeared that the land belonged to the Crown, and was in peaceable possession of its grantee, the defendant, but that the plaintiff and his predecessors in title had enjoyed uninterrupted occupation thereof for a period of fifty-six years down to a date about seven years prior to date of action :—

Held, that judgment was rightly entered for the defendant.

Occupation against the Crown for any period less than the sixty years required by the Nullum Tempus Act is of no avail against the title and legal possession of the Crown, and still less against its grantee in actual possession.

The Act 21 Jac. I, c. 14, only regulates procedure, and its effect is that if an information of intrusion is filed and the Crown has been out of possession for twenty years, the defendant is allowed to retain possession till the Crown has established its title. Where no information has been filed there is nothing to prevent the Crown or its grantee from making a peaceable entry and then holding possession by virtue of title.

Decisions by the Courts of New Brunswick and Nova Scotia, to the effect that when the Crown has been out of actual possession for twenty years it could not make a grant until it had first established its title by information of intrusion, overruled. EMMERSON *v.* MADDISON **P. C. 569**

11. —— *Ontario—Interest on Payments in Arrear — Ontario Judicature Act* (*Revised Statutes of Ontario*, 1897, *c.* 51), *s.* 113—*Construction.*

Ontario Judicature Act (Revised Statutes of Ontario, 1897, c. 51), s. 113, enacts that "interest shall be payable in all cases in which it is now payable by law or in which it has been usual for a jury to allow it" :—

Held, that under the true construction of this section it is incumbent upon the Court to allow interest for such time and at such rate as it may think right in all cases where a just payment has been improperly withheld, and compensation therefor seems fair and equitable.

An order by the Court below that the appellant company should pay arrears of track rentals within the limits of the respondent city, over and above their periodical payments already made, and should pay interest thereon, was affirmed. TORONTO RAILWAY COMPANY *v.* TORONTO CORPORATION - - - **P. C. 117**

PRIVY COUNCIL APPEALS—CANADA—*contd.*

12. —— *Ontario—Power of Dominion Parliament—Validity of Dominion Act* 60 & 61 *Vict. c.* 11, *s.* 6, *amended by* 1 *Edw.* 7, *c.* 13—*Power to expel and deport Aliens.*

Held, that s. 6 of the Dominion statute 60 & 61 Vict. c. 11, as amended by 1 Edw. 7, c. 13, s. 13, is intra vires of the Dominion Parliament.

The Crown undoubtedly possessed the power to expel an alien from the Dominion of Canada, or to deport him to the country whence he entered it. The above Act, assented to by the Crown, delegated that power to the Dominion Government, which includes and authorizes them to impose such extra-territorial constraint as is necessary to execute the power. ATTORNEY-GENERAL FOR THE DOMINION OF CANADA *v.* EVERETT E. CAIN; THE SAME *v.* GILHULA P. C. 542

13. —— *Ontario — Trespass, Action for — Ontario Act* 36 *Vict. c.* 102, *s.* 5—*Injunction—Arbitration Clauses—Remedy by Action—Failure of Company to proceed under their Act.*

In an action for trespass on the appellant's land and interference with his water rights, the respondents pleaded that they were authorized thereunto by their incorporating Act (36 Vict. c. 102, Ontario), and that the appellant's remedy (if any) was to proceed by arbitration under the Act :—

Held, that according to the true construction of s. 5 the arbitration clauses only come into operation on disagreement as to the amount of purchase-money, value, or damages arising after definite notice of expropriation and treaty or tender relative thereto; and that as the respondents had not proceeded in accordance with the directions of their Act, the appellant had not lost his remedy by action.

An injunction was rightly granted in this case, but its effect will cease on the respondents proceeding to expropriate in the manner directed by their Act. SAUNBY *v.* WATER COMMISSIONERS OF THE CITY OF LONDON AND THE CORPORATION OF THE CITY OF LONDON (ONTARIO) - - - - - - P. C. 110

14. —— *Quebec—Company — Directors—Resolution—Powers of Company—Purchase—Effect of Resolution by an insufficient Quorum—Quebec Act*, 1901 (1 *Edw.* 7, *c.* 67)—*Construction.*

Held, that under Quebec Act 1 Edw. 7, c. 67, the appellant company was empowered to acquire and hold for the purpose of its business real or immovable estate not exceeding a specified sum in yearly value in any part of the province except the judicial district of Quebec; and that, acting bona fide, it was the sole judge of what was required for that purpose.

Where a purchase intra vires of the above Act had been effected by the company under a resolution of the directors at a meeting on July 17, 1901, which authorized the completion thereof, subject to an option of reconveying within a specified time :—

Held, that after the lapse of the specified time the purchase was absolute, and that the company, which had furnished the vendor with a copy of the said resolution as one which had been duly and regularly passed, could not avoid

PRIVY COUNCIL APPEALS—CANADA—*contd.*

it by showing that it had been passed by an insufficient quorum. MONTREAL AND ST. LAWRENCE LIGHT AND POWER COMPANY *v.* ROBERT - - - - - - - P. C. 196

15. —— *Quebec—Employer and Workman—Contract that Deceased shall have no Claim—"Satisfaction" means Real and Tangible Indemnity — Quebec Civil Code, Art.* 1056—*Construction.*

The right of action conferred by Art. 1056 of the Civil Code of Quebec on the widow and relatives of a deceased employee whose death has been caused by the fault of his employer is an independent and personal right, and not derived from the deceased or his representatives.

Robinson v. *Canadian Pacific Ry. Co.*, [1892] A. C. 481, followed.

Held, that the deceased could not be said to have "obtained satisfaction" from the respondent company within the meaning of that article unless he had obtained a real and tangible indemnity for the fault in question.

Where the deceased, as a condition of his employment, became a member of an insurance and provident society, a by-law of which provided that in consideration of the respondents' subscription thereto no member thereof or his representatives shall have any claim against the respondents for compensation on account of injury or death from accident; and it appeared from the society's provisions for sick allowance and insurance, that the respondents contributed only to the former, the latter being a scheme for mutual life insurance :—

Held, that assuming this by-law to be valid, the deceased had not obtained satisfaction within the meaning of Art. 1056. The insurance money did not proceed from the respondents, had no relation to its offence, and was equally payable in case of natural death.

Reg. v. *Grenier*, (1899) 30 Sup. Ct. Can. 42, overruled. DAME MARY MILLER *v.* CANADA GRAND TRUNK RAILWAY COMPANY - P. C. 187

16. —— *Quebec — Police Pension Society — Judicial Duties of Directors—Rights of Members —Claim under the Rules by Policeman obliged to resign—Procedure on Inquiry.*

The rules of the respondent police pension society provided that every application for a pension should be fully gone into by the board of directors, and in particular that any member entitled thereto, who is dismissed from the police force or is obliged to resign, shall have his case considered by the board and his right thereto determined by a majority.

On an application for a pension by the appellant, who had been obliged to resign, the board, without any judicial inquiry into the circumstances, resolved to refuse the claim, "seeing that he was obliged to tender his resignation" :—

Held, in an action by the appellant in effect to compel a due administration of the pension fund, that this resolution was void and of no effect. The tender of resignation gave him the right to appeal to the board, and to have his claim as affected thereby duly considered and determined. It did not by itself forfeit rights acquired by length of service and regular

PRIVY COUNCIL APPEALS—CANADA—*contd.*
contribution to the pension fund. Case remitted to the Superior Court, with declarations directed to secure to the appellant a due consideration and determination thereof by a differently constituted board. LAPOINTE *v.* L'ASSOCIATION DE BIENFAISANCE ET DE RETRAITE DE LA POLICE DE MONTREAL - - - - - **P. C. 535**

17. —— *Quebec—Street—Cost of Improvements—Action to Recover Assessed Amounts—Assessment Due on Filing of the Roll—Prescription—Quebec Act* (52 *Vict. c.* 79), *ss.* 120, 144, 231—*Civil Code, Arts.* 2227, 2232 *and* 2236 —*Construction.*

Under s. 231 of the City of Montreal Charter, 1889 (52 Vict. c. 79), the amount of an assessment becomes due and recoverable on the filing of the roll of assessment in the office of the city treasurer.

In an action by the city to recover after the period of prescription enacted by s. 120, calculated from the date of filing, had elapsed, it appeared that the respondent's predecessor had been a party to proceedings had for its annulment :—

Held—(1.) that the period was not interrupted thereby within the meaning of Art. 2227 of the Civil Code, for there had been no acknowledgment of liability ;

(2.) that there had been no impossibility to sue within the meaning of Art. 2232, for the right of action was not by the above Act suspended during such proceedings ;

(3.) that the debt in suit was not dependent on a condition within the meaning of Art. 2236 : though s. 144 of the Act limited the time within which the roll might be annulled, it did not make the date of its coming into force conditional on the roll not being either attacked or annulled. CITY OF MONTREAL *v.* CANTIN - **P. C. 241**

18. —— **CAPE OF GOOD HOPE**—*Railway Contract—Construction—Penalty for Non-completion of Line—Liquidated Damages—"Actual Cost" does not include Interest on Moneys Expended.*

It was provided in a railway construction contract that in the event which happened of non-completion of the line within a specified period the plaintiff contractor should forfeit to the defendant Government certain percentages which the Government retained out of moneys payable under this and two other railway contracts as a guarantee fund to answer for defective work and also certain security money lodged with its Agent-General "as and for liquidated damages sustained by the said Government for the non-completion of the said line" ; and that it should be lawful for the Government to take possession of the incomplete line and pay the balance due in respect of its "actual cost" :—

Held that, on its true construction, the term "actual cost" was limited to the amount of moneys expended on the work, and that interest thereon could not be added.

Held, further, that the Government was not entitled to the retention and security moneys as liquidated damages ; for the total amount thereof was indefinite, and in the case of the retention moneys depended on the progress of

PRIVY COUNCIL APPEALS—CAPE OF GOOD HOPE—*continued.*
construction, the amount of the percentages, and the quantity of defective work. It could not, therefore, be treated as a genuine pre-estimate of loss ; but the Government was entitled to obtain judgment in reconvention for such damages as it may have actually suffered through the plaintiff's breach of contract and deduct the same from the funds in question. PUBLIC WORKS COMMISSIONER *v.* HILLS **P. C. 368**

19. —— **INDIA**—*Bombay—Appeal—Right of Appeal to the King in Council—Appellate Orders of the Governor of Bombay in Council—Decrees of Courts of Political Agents in Kathiawar —British Political Tribunals in a Foreign State —Courts established by the Executive for Political Purposes—Suits to enforce and redeem a Mortgage.*

The intention of the British Government is and always has been that the jurisdiction exercised in connection with the province of Kathiawar should be political and not judicial in its character ; the ultimate appeal being to the Secretary of State for India in Council. Kathiawar is not as a whole within the King's dominions. It has been controlled by the British Indian Government for a very long period in different degrees in its various component States, but has never been treated as British territory or as subject to the laws in force in the Bombay Presidency or enacted by the British Indian Legislature. Nor has there been any authoritative assertion of territorial sovereignty therein. A system of judicial administration has been established therein, not by legislation, but by orders of the Executive Government, the judicial officers being Assistant Political Agents, with an appeal to Political Agents to deal with cases both political and civil. In the former cases their functions are "diplomatic and controlling," deciding as they "think proper" ; in both the intention of the Government is and has been that the jurisdiction exercised should be guided by policy rather than by strict law :—

Held accordingly in two suits, one classed as civil to enforce a mortgage, and the other classed as political to redeem a mortgage, brought in the Courts of Assistant Political Agents in Kathiawar, that an appeal does not lie from appellate orders therein passed by the Governor of Bombay in Council to His Majesty in Council. HEMCHAND DEVCHAND *v.* AZAM SAKARLAL CHHOTAMLAL - - - - - **P. C. 212**

20. —— **JERSEY**—*Validity of Will—Undue Influence—Evidence of Executors inadmissible—Laws of Jersey.*

In a suit by the heir-at-law of a testatrix against her executors and trustees and beneficiaries to set aside her will and codicil on the ground that at the date of execution thereof she was infirm of body, weak in mind, and under the undue influence of persons named :—

Held—(1.) that by law and custom of Jersey the evidence of the executors was rightly excluded ;

(2.) That certain persons who were neither legatees nor trustees of her charitable trusts, but parochial authorities whose co-operation in

PRIVY COUNCIL APPEALS—JERSEY—*contd.*

administering them might be necessary, were wrongly added as parties, and were not on that account disqualified as witnesses ;

(3.) That, on the evidence, the testatrix was of sound mind, memory and understanding, and that there was no evidence of undue influence, since both will and codicil were shown to have been the expression of the testatrix's own wishes, not induced by either fraud or coercion.

Boyse v. *Rossborough*, (1856) 6 H. L. C. 2, approved.

And, having regard to the jealousy with which evidence is excluded, a plaintiff should be held strictly to the case made by the pleadings and not allowed to pursue a charge of fraud for which no foundation is laid therein. BAUDAINS *v.* RICHARDSON - - - - - **P. C. 169**

21. —— **NATAL**—*Mines—Private Coal Fields —Royalties on Coal extracted—Construction—Natal Mines Act*, 1889, *s.* 25.

Held, that the appellants, who owned and worked their collieries before the passing of the Natal Mines Act, 1899, their title to do so having been expressly affirmed by Law No. 34 of 1888, were, by the true construction of s. 25 of the Act of 1899, exempted from liability to take out licences for working the same, and consequently from liability to pay royalties on the coal extracted therefrom. DUNDEE COAL COMPANY, LIMITED *v.* MINISTER OF AGRICULTURE OF THE COLONY OF NATAL - - - **P. C. 511**

22. —— **NEW SOUTH WALES**—*House or other Building or Manufactory, Prohibition against the Compulsory Acquisition of a Part only by a—New South Wales Public Works Act*, 1900, *s.* 131—*Construction.*

Held, that the prohibition in the New South Wales Public Works Act, 1900, s. 131, against the compulsory acquisition of a part only of a house or other building or manufactory where the owner is willing and able to convey the whole, applies on the true construction and intention of the Act to both methods of acquisition authorised thereby, whether by notification in the Gazette or by notice to the parties. WILLIAMS *v.* PERMANENT TRUSTEE COMPANY OF NEW SOUTH WALES, LIMITED - - - **P. C. 249**

23. —— *Penalty, Liability to—New South Wales Act* (2 *Edw.* 7, *No.* 35), *s.* 24—*Construction.*

Under the New South Wales Act (2 Edw. 7, No. 35), s. 24, according to its true construction, a person holding a civic office is not liable to a penalty as being knowingly interested in a contract with his municipality when he has merely supplied materials to a contractor who chooses to buy them from him without any concerted arrangement that he should do so. NORTON *v.* TAYLOR - - - - - - **P. C. 378**

24. —— **NEW ZEALAND** — *Action for Wrongful Dismissal — Plea of Justification — Verdict for Damages—Duty of the Trial Judge —New Trial ordered.*

There is no fixed rule of law defining the degree of misconduct which will justify dismissal from service.

It is a question for the jury whether the degree of misconduct was inconsistent with the fulfilment of the express or implied conditions of service, so as to justify dismissal.

The judge should not submit any issue to them if, in his opinion, no evidence of justification has been given. If he submits the issue he should direct, guide and assist them ; direct, by informing them of the nature of the acts which, as a matter of law, would justify dismissal ; guide, by calling their attention to the material facts ; assist, in a manner and to an extent which there is no reason to define.

In an action for wrongful dismissal where a plea of justification was substantially set up :—

Held, that the judge was right in submitting the issues of fact to the jury ; that the verdict for the plaintiff was so unsatisfactory that it ought not to be maintained ; that rule 5 in the Schedule to the Court of Appeal (New Zealand) Act, 1882 (similar to Order LVIII., r. 4, 1875), enabled judgment to be entered according to the evident justice of the case ; but that under the circumstances a new trial should be directed. CLOUSTON & CO. *v.* CORRY **P. C. 122**

25. —— *Revenue — Income Tax — Income derived from Business—Business carried on in the Colony or Profits received—New Zealand Land and Income Assessment Act, No. 49 of* 1900, *s.* 59—*Construction.*

By s. 59 of the New Zealand Land and Income Assessment Act, No. 49 of 1900, taxable income derived from business includes profits derived from New Zealand as well as profits received in New Zealand.

The respondent company, with its head office in London, carried on the business of international telegraphy in New Zealand and at various places in Australia and elsewhere in accordance with the rules contained in the St. Petersburg Convention of 1875 and subsequent regulations.

In an action by the appellant to recover income tax (*inter alia*) on profits derived by the respondents, but not received in New Zealand, for transmitting messages beyond Australia, and over their cables other than those between New Zealand and the Australian Colonies :—

Held, that these were not profits derived from New Zealand, or from business done there, within the meaning of s. 59. There was no evidence of any contractual relation, expressed or implied, having been established in New Zealand, either with the New Zealand Government or with the senders of the telegrams, to carry the telegrams to their ultimate destination. Having regard to the terms of the convention and regulations and published conditions of the respondents' business, it was not shewn, and could not be implied, that the New Zealand Government contracted to do more than start the telegrams and then hand them over to the owners of the next stage.

Erichsen v. *Last*, (1881) 8 Q. B. D. 414, distinguished. COMMISSIONERS OF TAXES FOR NEW ZEALAND *v.* EASTERN EXTENSION AUSTRALASIA AND CHINA TELEGRAPH COMPANY, LD. - - - - - **P. C. 526**

PRIVY COUNCIL APPEALS—*continued.*

26. —— **NEWFOUNDLAND**—*Practice—Appeal admitted by the Supreme Court dismissed as Incompetent—Special Leave to Appeal refused.*

Where a final decree for money was made against the appellant on April 6, 1898, and a motion to set it aside was dismissed on June 7, 1899, and again on August 29, 1904, and the appellant's application to restrain execution was refused on March 20, 1905 :—

Held, on the respondent's petition that an appeal from the order of March 20, 1905, must be dismissed. It was merely a repetition of the order of August 29, 1904, from which an appeal was barred :

Held, also, on the appellant's petition that special leave to appeal from the orders of June, 1899, and August, 1904, must be refused, having regard to delay, and the impossibility of obtaining any relief without reversing the final judgment of April 6, 1898, to which no objection could be maintained. GRIEVE *v.* TASKER **P. C. 132**

27. —— **TASMANIA** — *Seashore — Trespass, Action of—Title to Foreshore under a Crown Grant—Construction — Improper Rejection of Evidence—Acts of User before the Grant admissible—Grant of Lands already in Possession of Grantee.*

In an action against the respondents for a trespass by their agents on the foreshore, the appellants claimed that they were entitled thereto under a Crown grant in 1848 conveying to them the lands of which prior to the grant they had taken possession and on which they had expended money ; and the judge directed the jury that evidence of acts of user antecedent to the grant was inadmissible :—

Held, that the appellants were entitled to a new trial. Acts of user before the grant led up to and explained what was afterwards granted, and were cogent evidence of what was intended to pass thereby.

Held, further, that a direction to the effect that a lease by the appellants of part of a jetty extending over the foreshore was only evidence of an easement, not of the lessor's title to the land over which the structure was erected, was also calculated to mislead. It ought to have been to the effect that it was clearly evidence of seisin in the locus in quo. VAN DIEMEN'S LAND COMPANY *v.* MARINE BOARD OF TABLE CAPE - - - - - - - - **P. C. 92**

28. —— **TRANSVAAL** — *Partnership—Purchase by two Partners without the knowledge of the third—Suits for an Account—Scope of the Partnership—Rights of Partners.*

The respondent and the two appellants, under a partnership arrangement in 1902, bought with a view to resale the properties of H., consisting of stands or plots of land laid off for building, and of shares in a company entitled to other stands in the same locality. The appellants, apart from the respondent, purchased some other of the company's stands and made profits.

In a suit by the respondent for an account thereof the Court below held that, though the stands so purchased were not within the scope of the partnership of 1902, they were connected

PRIVY COUNCIL APPEALS—TRANSVAAL—*continued.*

with it indirectly ; that the purchase thereof by the appellants was secret and injurious to the common interest, and that the respondent was entitled to share in the benefit thereof :—

Held (reversing this decree), that it could not be supported on authority or on any recognised equity.

The purchase, not being within the scope of the partnership, was not shown to have been in rivalry or any other connection therewith, nor in any way injurious thereto. TRIMBLE *v.* GOLDBERG - - - - - - - **P. C. 494**

29. —— **TURKS AND CAICOS ISLANDS**—*Power of Attorney to Possess and Manage—Power not coupled with an Interest—Power held to be revocable—Contract for personal Services—Specific Performance—Ejectment—Injunction—Mortgage.*

In an action of ejectment the jury found that the appellant was in possession under a power of attorney for which he had given consideration other than and additional to that mentioned therein, viz., a personal guarantee to a mortgagee of the estate in suit that he would pay the mortgage debt on the day of redemption :—

Held (1.) that parol evidence of this additional consideration was admissible, for such evidence did not contradict the power ;

(2.) That the power was nevertheless revocable, inasmuch as it merely appointed the appellant manager at a salary and contained no reference to any special interest created by his guarantee, and was not intended to subserve or to be dependent on the continuance of such interest ;

(3.) That, assuming it to be irrevocable, he had not a good equitable defence to ejectment, since the contract with him was entire, and an inseparable part of it related to personal service. The appellant accordingly could not obtain specific performance thereof, and therefore could not obtain an injunction against an action of ejectment. FRITH *v.* FRITH - - **P. C. 254**

30. —— **VICTORIA**—*Drain, Construction of —Negligence—Liability of Municipal Authorities—Exercise of Statutory Powers.*

Where municipal authorities under their statutory powers took over the care of a watercourse and made it into a public drain, which proved in course of time to be increasingly insufficient to hold and pass on the mixture of slime and sewage poured into it, with the result that the plaintiff's property was flooded thereby :—

Held, that they were liable for negligence, notwithstanding that the drain when first formed was sufficient for its purpose. HAWTHORN CORPORATION *v.* KANNULUIK - **P. C. 105**

PROSPECTUS—Non-disclosure of contracts—Directors' liability—Proof of damage—Waiver clause - - - - - **24**
See COMPANY. 2.

PUBLIC HEALTH (SCOTLAND)—Assessment—Special drainage district—Expenses of forming special district - - **354**
See SCOTTISH LAW. 1.

QUEBEC—Laws of - - **187, 196, 241, 535**
See PRIVY COUNCIL APPEALS. 14–17.

QUEENSLAND—Laws of - - - - **360**
See PRIVY COUNCIL APPEALS. 5.

QUORUM—Company — Directors — Purchase — Effect of resolution by an insufficient quorum—Laws of Canada - - **196**
See PRIVY COUNCIL APPEALS. 14.

RAILWAY—Contract—Penalty for non-completion of line—Liquidated damages—"Actual cost" - - - - **368**
See PRIVY COUNCIL APPEALS. 18.

—— Contract—"Whole operation of its railway"—Laws of Canada - - **100**
See PRIVY COUNCIL APPEALS. 7.

—— Foreshore—Power of the Dominion to legislate for provincial Crown property—Laws of British Columbia - **204**
See PRIVY COUNCIL APPEALS. 8.

RATES—*Assessments—Composition in lieu of Rates—Statutory Exemption*—52 *Geo.* 3, *c.* 49, *ss.* 3, 5—2 *&* 3 *Will.* 4, *c.* 66, *ss.* 2, 3—*City of London Sewers Act*, 1848 (11 *&* 12 *Vict. c.* 163), *s.* 169.

A statute of 1812 enacted that a fixed composition in lieu of rates which had been voluntarily paid by the Treasury in respect of Crown property in the City of London should be paid every year for ever out of the consolidated customs to the rate collectors, and that the premises should be exempt from all rates and assessments, though they might become private property. A statute of 1832 repealed so much of the Act of 1812 as made the composition payable out of the consolidated customs, and enacted that the collectors should collect the composition, and no more, from the occupiers of the property, which was about to be sold by the Treasury. The premises having become private property, the occupiers were assessed to rates under the City of London Sewers Act, 1848 :—

Held (affirming the decision of the Court of Appeal), that upon the true construction of the arrangement made in the statutes of 1812 and 1832 the exemption applied to future as well as existing rates and assessments, and that it was not affected by the City of London Sewers Act, 1848. LONDON CORPORATION *v.* NETHERLANDS STEAMBOAT COMPANY - - **H. L. (E.) 263**

2. —— *Distress — Expenses of Distress — Reasonable Charges of taking, keeping and selling Distress—Poor Rate—Distress (Costs) Act*, 1817 (57 *Geo.* 3, *c.* 93), *s.* 1, *Schedule—Distress (Costs) Act*, 1827 (7 *&* 8 *Geo.* 4, *c.* 17)—*Distress for Rates Act*, 1849 (12 *&* 13 *Vict. c.* 14), *s.* 1.

The provisions of the Distress (Costs) Act, 1817, as applied by the Distress (Costs) Act, 1827, to distresses for poor rate, are not repealed by the Distress for Rates Act, 1849, s. 1. Therefore, in the case of a distress for poor rate in respect of an amount not exceeding 20*l.*, it is illegal to make any charge for the expenses of the distress in excess of the scale given in the schedule to the Distress (Costs) Act, 1817.

RATES—*continued.*

The decision of the Court of Appeal, [1905] 1 K. B. 219, affirmed.

Hill v. *Pannifer*, [1904] 1 K. B. 811, overruled. COSTER *v.* HEADLAND **H. L. (E.) 286**

3. —— *Factory with Machinery, Rating of —Poor Rate—Machines used in connection with Hereditament, but remaining the Personal Property of the Tenant.*

Tenants' machinery placed in a factory, and used therewith for the business of the factory, whether it be affixed to the freehold or not, may be taken into consideration so as to increase the amount in assessing the factory to the poor rate. The law and practice to this effect have been too long established to be now overruled. KIRBY *v.* HUNSLET UNION ASSESSMENT COMMITTEE **H. L. (E.) 43**

4. —— *Rating—"House"—"Inhabitant"—"Occupier"—House occupied otherwise than as a Dwelling-house—Parish of St. Paul, Covent Garden—Rector's Rate*—51 *Geo.* 3, *c. cl.*, *s.* 2.

Houses in the parish of St. Paul, Covent Garden, were used as warehouses, counting-houses, and offices. They had formerly been used for residence, but no longer contained bedrooms, kitchens, or fireplaces, and no person slept there. They could readily be fitted for use as dwelling-houses :—

Held, that they were liable to the rector's rate as "houses" within the meaning of 51 Geo. 3, c. cl., s. 2.

The decision of the Court of Appeal, [1905] 1 K. B. 669, reversed. LEWIN *v.* END **H. L. (E.) 299**

RATIFICATION—Policy effected by owner of ship for all persons to whom the subject-matter might appertain - - **336**
See INSURANCE MARINE.

—— Trade union—Authority of branch officials to bind union - - - - - **384**
See EMPLOYER AND WORKMAN. 3.

REFRESHMENTS—Contract—Performance impossible - - - - - - - **7**
See CONTRACT.

REPAIR—Promise by landlord to repair—Personal injury to tenant's wife—Landlord not liable - - - - - **428**
See LANDLORD AND TENANT.

REPUDIATION — Contract, construction of — Breach—New trial must be on motion—Law of British Honduras - - **515**
See PRIVY COUNCIL APPEALS. 6.

RESOLUTION—Company—Directors—Purchase —Effect of resolution by an insufficient quorum—Laws of Canada - - **196**
See PRIVY COUNCIL APPEALS. 14.

RESTRAINT OF TRADE—*Covenant—Breach—Agreement by Vendor of Business not to "carry on or be concerned or interested in" a similar Business—Sale on Credit.*

The respondent, a coal merchant carrying on both a home and an export business, sold the home business to the appellants and covenanted with them that he would not "solely or jointly

RESTRAINT OF TRADE—*continued.*

with any other person either directly or indirectly carry on or be concerned or interested in the coal trade in any part of Great Britain or the Isle of Man." He afterwards sold the export business to a company and took the purchase-money in shares. The company afterwards sold the export business to a firm, the purchase-money being payable to the company by instalments lasting over several years. The firm having begun to carry on both a home and an export business, the appellants brought an action against the respondent for breach of covenant :—

Held, that the respondent was not "concerned or interested in" the home business in the business sense which must be attributed to those words, and that there was no breach of covenant. WILLIAM CORY & SON, LIMITED *v.* C. W. HARRISON - - - - - **H. L. (E.) 274**

REVENUE—*Income Tax—Gas Company—Standard Rate of Dividend—Payment of Dividend free of Income Tax—Income Tax Act*, 1842 (5 *&* 6 *Vict. c.* 35), *ss.* 40, 54, 60, *Sched. A., No. III., r.* 3.

By the special Act of a gas company it was provided that the profits to be divided among the shareholders in any year should not exceed a given rate :—

Held, that in arriving at the rate of dividend the profits ought to be calculated as inclusive and not exclusive of the amount payable for the year in respect of income tax.

The decision of the Court of Appeal, *Attorney-General* v. *Ashton Gas Co.*, [1904] 2 Ch. 261, affirmed. ASHTON GAS COMPANY *v.* ATTORNEY-GENERAL - - - - - - **H. L. (E.) 10**

2. —— *Income Tax—Nitrate Grounds situate Abroad—Profits and Gains—Deduction to meet Exhaustion of Material—Deduction on account of Diminution of Capital—Income Tax Act*, 1842 (5 *&* 6 *Vict. c.* 35), *s.* 100, *Sched. D. ; First Case, r.* 3 ; *s.* 159.

An English company owned land abroad which they had bought for a large sum, and where they carried on a manufacture of nitrates and iodine by working up certain deposits found on the land. In estimating their yearly profits and gains from the sale of the nitrates and iodine for assessment to the income tax under Sched. D. :—

Held, that the company were not entitled to make any deduction in respect of the exhaustion of the deposits.

The decision of the Court of Appeal, [1905] 1 K. B. 184, affirmed. ALIANZA COMPANY *v.* BELL - - - - - - - **H. L. (E.) 18**

3. —— *Income Tax—"Residence"—"Person Residing in the United Kingdom"—Company Registered Abroad — Head Office Abroad — General Meetings Abroad—Directors' Meetings in England and Abroad—Majority of Directors in England—Company's Business in England and Abroad—Income Tax Act*, 1853 (16 *&* 17 *Vict. c.* 34), *s.* 2 ; *Sched. D.*

A foreign corporation may reside in this country for the purposes of income tax. The test of residence is not where it is registered, but where it really keeps house and does its real business. The real business is carried on where

REVENUE—*continued.*

the central management and control actually abides.

Whether any particular case falls within that rule is a pure question of fact, to be determined not according to the construction of this or that regulation or by-law, but upon a scrutiny of the course of business and trading.

Decision of the Court of Appeal, [1905] 2 K. B. 612, affirmed. DE BEERS CONSOLIDATED MINES, LIMITED *v.* HOWE (SURVEYOR OF TAXES) - - - - - **H. L. (E.) 455**

4. —— *Income Tax — Trade — Balance of Profits — Deductions — Expenses Incurred in Earning Profits—Loss Arising from Negligence —Hotel—Injury to Guest—Damages—Income Tax Act*, 1842 (5 *&* 6 *Vict. c.* 35), *s.* 100 ; *Sched. D.*

A brewery company owned an inn which was carried on by a manager as part of their business. A customer sleeping in the inn was injured by the fall of a chimney, and recovered damages and costs against the company for the injury, which was owing to the negligence of the company's servants :—

Held, that the damages and costs could not be deducted in estimating the balance of profits for the purpose of the income tax, the loss not being connected with or arising out of the trade, and not being money wholly and exclusively laid out or expended for the purposes of the trade.

Decision of the Court of Appeal, [1905] 2 K. B. 350, affirmed. STRONG & CO., OF ROMSEY, LIMITED *v.* WOODIFIELD (SURVEYOR OF TAXES) **H. L. (E.) 448**

5. —— *Income Tax—Unincorporated Association—Exemption—Income Not Exceeding* 160*l.* *—Income Tax Act*, 1842 (5 *&* 6 *Vict. c.* 35), *ss.* 40, 163, 168, 192—*Finance Act*, 1894 (57 *&* 58 *Vict. c.* 30), *s.* 34.

An unincorporated association is not exempt from liability to the payment of income tax by reason of its income not exceeding 160*l.* a year.

Decision of the First Division of the Court of Session (as the Court of Exchequer), Scotland, (1904) 7 F. 119, reversed. CURTIS *v.* OLD MONKLAND CONSERVATIVE ASSOCIATION **H. L. (Sc.) 86**

6. —— *Stamp — Conveyance — Ad Valorem Duty—Consideration—Consideration Payable on Contingency—Stamp Act*, 1891 (54 *&* 55 *Vict. c.* 39), *s.* 56, *sub-s.* 2, *s.* 57.

Part of the consideration for the sale of a company's assets to another company was that the buying company should pay out of its profits to the selling company an annual dividend of 3 per cent. upon capital issued, after paying to its own shareholders a 5 per cent. dividend upon its shares :—

Held, that the dividend of 3 per cent., though payable on a contingency or more than one contingency, was "money payable periodically" within the meaning of the Stamp Act, 1891, c. 39, s. 56, sub-s. 2.

The decision of the Court of Appeal, [1905] 1 K. B. 174, affirmed. UNDERGROUND ELECTRIC RAILWAYS COMPANY, OF LONDON, LIMITED, *v.* INLAND REVENUE COMMISSIONERS **H. L. (E.) 21**

REVENUE—*continued.*

—— Excise duty—Power of Commonwealth Parliament - - - - - - **360**
See PRIVY COUNCIL APPEALS. 5.

—— Income tax—Business carried on in the Colony or profits received—Law of New Zealand - - - - - - **526**
See PRIVY COUNCIL APPEALS. 25.

RIPARIAN PROPRIETORS—Rights of—Abstraction of the whole of the water from river—Ex adverso mill owners
See RIVER. **72**

RIVER—*Rights of Riparian Proprietors—Abstraction of the Whole of the Water from River—Ex adverso Mill Owners.*

By the general law applicable to running streams every proprietor has a right to the ordinary use of the water flowing past his land, also rights may be acquired by prescription which interfere with the natural rights of other proprietors; but the ownership of an artificial dam, although it may give a right to maintain the dam, does not turn the running stream into a pond so as to give the owner of the dam an exclusive right to use the whole of the running water.

Decision of the Second Division of the Court of Session, Scotland, (1905) 42 S. L. R. 330, reversed. JOHN WHITE & SONS *v.* J. & M. WHITE - - - - - - **H. L. (Sc.) 72**

ROYALTIES — Mines — Private coal fields — Royalties on coal extracted—Law of Natal - - - - - - - **511**
See PRIVY COUNCIL APPEALS. 21.

RULES OF SUPREME COURT—Order LVIII. (*Appeals to the Court of Appeal*), **r. 4**
See HUSBAND AND WIFE. **148**

ST. PAUL, COVENT GARDEN (PARISH OF)—Rating—"House"—"Inhabitant"—"Occupier" - - - - - **299**
See RATES. 4.

SALMON FISHING.
See under FISHERY.

SATISFACTION — Employer and workman — Contract that deceased shall have no claim—"Satisfaction" means real and tangible indemnity — Laws of Canada **187**
See PRIVY COUNCIL APPEALS. 15.

SCOTTISH LAW—*Assessment—Special Drainage District — Expenses of forming Special District—Public Health (Scotland) Act*, 1897 (60 & 61 *Vict. c.* 38) *s.* 133.

By s. 133 of the Public Health (Scotland) Act, 1897: "In any burgh or where any special drainage district has been formed under this Act . . . . the expense incurred by the local authority for sewerage or drainage within the same or for the purposes thereof and the sums necessary for payment of any money borrowed therefor either before or after the passing of this Act, together with the interest thereof, shall be paid out of a special sewer assessment

SCOTTISH LAW—*continued.*

which the local authority shall raise and levy on and within such . . . . special district":—

Held (affirming the decision of the First Division of the Court of Session, (1904) 6 F. 553), that where a special drainage district has been formed in a county the local authority is entitled to levy an assessment within the special district to meet expenses, including legal expenses necessarily and properly incurred in connection with, but prior to, the formation of the district. INVERARITY *v.* FORFARSHIRE COUNTY COUNCIL - - - **H. L. (Sc.) 354**

2. —— *Heritage — Right in Security — Messenger-at-Arms—Heritable Securities (Scotland) Act*, 1894 (57 & 58 *Vict. c.* 44), *ss.* 8, 10—*Scottish Law.*

By the Heritable Securities (Scotland) Act, 1894, s. 8, any creditor who has exposed for sale under his security the lands held in security . . . . may apply to the sheriff for decree in the terms of Sched. D. thereto annexed, and the sheriff may "after service on the proprietor and on the other creditors, if any, and after such intimation and inquiry as he may think fit, grant such application and issue decree in the said terms. On such decree being pronounced and an extract thereof in which said lands shall be described at length or by reference recorded in the appropriate register of sasine, the right of redemption reserved to the debtor shall be extinguished, and the creditor shall have right to the lands disponed in security in the same manner and to the same effect as if the disposition in security had been an irredeemable disposition as from the date of such decree." By s. 10 "no purchaser from the creditor or other successor in title in the lands shall be under any duty to inquire into the regularity of the proceedings under which such creditor has acquired right to the lands held under his security by virtue of the provisions contained herein, or be affected by any irregularity therein, without prejudice to any competent claim of damages against such creditor."

In 1895 certain creditors presented a petition under s. 8 of the above Act. The appellant, the proprietor of the lands, did not appear. The sheriff granted decree. Thereafter the creditors sold the lands and granted dispositions in favour of the purchasers.

In 1901 the original proprietor brought an action against the creditors and purchasers for reduction of the citation and execution of service upon him of the petition in the sheriff Court, alleging that the service had been executed by a messenger-at-arms, who was not an officer of the sheriff Court; and he pleaded that such service, with all that had followed thereon, including the disposition to the purchasers, was null and ineffectual:—

Held, affirming the decision of the Second Division of the Court of Session, (1902) 4 F. 957, that, assuming the service to be as stated, the error was an "irregularity in the proceedings" within the meaning of s. 10 of the Heritable Securities (Scotland) Act, 1894, and consequently that the right of the purchasers was not affected thereby. SUTHERLAND *v.* THOMSON (MANAGER

SCOTTISH LAW—*continued.*

OF STANDARD LIFE ASSURANCE COMPANY) (Second Appeal) - - - **H. L. (Sc.) 51**

—— Domicil, Acquisition of — Intention — Legitim - - - - - - - **56**
See DOMICIL.

—— Poor Law—Settlement by residence—Support by charitable institution - **344**
See POOR LAW.

—— River—Riparian proprietors, Rights of—Abstraction of the whole of the water from river—Ex adverso mill owners **72**
See RIVER.

SCREEN—To prevent acquisition of right to light—"Building"—Open spaces - **1**
See BURIAL.

SEASHORE—Trespass—Title to foreshore under a Crown grant—Construction - **92**
See PRIVY COUNCIL APPEALS. 27.

SECRETARY—Share certificate fraudulently issued by secretary—Forgery—Scope of employment—Estoppel - - **439**
See COMPANY. 3.

SECURITY—Heritage—Right in security—Messenger-at-arms - - - - - **51**
See SCOTTISH LAW. 2.

SERVANT—Master and.
See under MASTER AND SERVANT.

SET-OFF—Truck Acts—Deduction from wages—Debt due from workman to employer - - - - - - - **136**
See EMPLOYER AND WORKMAN. 4.

SETTLEMENT (POOR LAW).
See under POOR LAW.

SEWERS—Negligence—Liability of municipal authorities—Laws of Victoria - **105**
See PRIVY COUNCIL APPEALS. 30.

SHARES.
See under COMPANY.

SHIPPING—*Collision—Both Ships at fault—Competency of reopening the Question of Damage at the instance of the Cargo Owners—Merchant Shipping Act*, 1894 (57 & 58 *Vict. c.* 60), *ss.* 503, 504.

The finding of value in a collision action between the owners of two ships is not conclusive on the owners of cargo in ulterior proceedings.

A collision between the steamship *Anglia* and the steamship *Olga* resulted in the sinking of the *Anglia* and in the *Olga* being slightly damaged. In cross actions of damages between the owners of the *Anglia* and the owners of the *Olga* both vessels were found to be in fault, and the owners of the *Anglia* obtained a decree against the owners of the *Olga* for 7149*l.* 14*s.* 7*d.*, being one-half of the value of the *Anglia* after deducting one-half of the damage to the *Olga*. The owners of the *Olga* then presented a petition under ss. 503 and 504 of the Merchant Shipping Act, 1894, for limitation of their liability, and the owners of the *Anglia* lodged a claim in the petition claiming to be ranked and preferred on the fund for the full

SHIPPING—*continued.*

amount of the decree obtained by them against the *Olga*. The owners of the cargo of the *Anglia* at the time of the collision also claimed to be ranked on the fund to the extent of one-half of the value of the cargo lost by the collision, and contended that the decree for 7149*l.* 14*s.* 7*d.* was not binding on them; that the value of the *Anglia* on the basis of which that decree was obtained was an over-estimate of her true value; and that the owners of the *Olga* had no interest to contest the value of the *Anglia*, in respect that, once it was decided that both vessels were to blame, the question of exact values became immaterial to the owners of the *Olga*.

The Court of Session was of opinion that the owners of the *Anglia*, having been duly constituted against a debtor in foro, must be taken at the amount fixed in the collision action:—

Held (reversing the decision of the Court of Session, (1905) 7 F. 739), that the owner of cargo was not precluded from shewing the real value of the ship by the findings in an action to which he was no party and in which no one could be heard who was concerned to protect his interest. C. A. VAN EIJCK AND ZOON *v.* SOMERVILLE - - - - **H. L. (Sc.) 489**

—— Insurance, Marine—Policy—Ratification **336**
See INSURANCE, MARINE.

SPECIFIC PERFORMANCE—Power of attorney—Ejectment—Injunction—Mortgage—Laws of Turks and Caicos Islands **254**
See PRIVY COUNCIL APPEALS. 29.

STAMP—Conveyance—Ad valorem duty—Consideration payable on contingency **21**
See REVENUE. 6.

STATUTES:—

I. IMPERIAL STATUTES.

1623.

21 Jac. 1, c 14—*Limitations* - - **569**
See PRIVY COUNCIL APPEALS. 10.

1811.

51 Geo. 3, c. cl., s. 2—*Parish of St. Paul, Covent Garden* - - - - **299**
See RATES. 4.

1812.

52 Geo. 3, c. 49, ss. 3, 5—*Rates* - - **263**
See RATES. 1.

1817.

57 Geo. 3. c. 93, s. 1, Schedule—*Distress—Costs* - - - - - - **286**
See RATES. 2.

1827.

7 & 8 Geo. 4, c. 17—*Distress—Costs* - **286**
See RATES. 2.

1831.

1 & 2 Will. 4, *c.* 37, s. 3—*Truck Act* - **136**
See EMPLOYER AND WORKMAN. 4.

STATUTES —*continued.*

1832.

2 & 3 Will. 4, c. 66, ss. 2, 3—*Rates* - 263
See RATES. 1.

1842.

5 & 6 Vict. c. 35, ss. 40, 54, 60, Sched. A. No. III., *r.* 3—*Income Tax* - - 10
See REVENUE. 1.
—— —— ss. 40, 163, 168, 192 - - 86
See REVENUE. 5.
—— —— s. 100, Sched. D. - - - 448
See REVENUE. 4.
—— —— s. 100, Sched. D., First Case, *r.* 3; s. 159 - - - - - - - 18
See REVENUE. 2.

1848.

11 & 12 Vict. c. 163, s. 169—*City of London Sewers* - - - - - - 263
See RATES. 1.

1849.

12 & 13 Vict. c. 14, s. 1—*Distress for Rates* - - - - - - - 286
See RATES. 2.

1853.

16 & 17 Vict. c. 34, s. 2, Sched. D—*Income Tax* - - - - - - 455
See REVENUE. 3.

1867.

30 & 31 Vict. c. 131, s. 38—*Companies* - 24
See COMPANY. 2.

1870.

33 & 34 Vict. c. 78, s. 43—*Tramways* - 277
See TRAMWAYS.

1877.

40 & 41 Vict. c. 35, s. 1—*Metropolitan Open Spaces* - - - - - 1
See BURIAL.

1881.

44 & 45 Vict. c. 34, ss. 4, 5—*Metropolitan Open Spaces* - - - - - 1
See BURIAL.

1884.

47 & 48 Vict. c. 72, s. 3—*Disused Burial Grounds* - - - - - - 1
See BURIAL.

1890.

53 & 54 Vict. c. 45, ss. 1, 4—*Police* - 291
See POLICE.

1891.

54 & 55 Vict. c. 39, s. 56, sub-s. 2; s. 57—*Stamps* - - - - - - 21
See REVENUE. 6.

1893.

56 & 57 Vict. c. 63, s. 1—*Married Women's Property* - - - - - - 148
See HUSBAND AND WIFE.

STATUTES—*continued.*

1894.

57 & 58 Vict. c. 30, s. 34—*Finance* - 86
See REVENUE.
57 & 58 Vict. c. 44, ss. 8, 10—*Heritable Securities—Scotland* - - - 51
See SCOTTISH LAW. 2.
57 & 58 Vict. c. 60, ss. 503, 504—*Merchant Shipping* - - - - - 489
See SHIPPING.

1897.

60 & 61 Vict. c. 37—*Workmen's Compensation* - - - - - - - 409
See EMPLOYER AND WORKMAN. 1.
—— —— s. 7 - - - - - - 325
See EMPLOYER AND WORKMAN. 2.
60 & 61 Vict. c. 38, s. 133—*Public Health —Scotland* - - - - - - 354
See SCOTTISH LAW. 1.

1898.

61 & 62 Vict. c. 21, s. 1—*Poor Law—Scotland* - - - - - - 344
See POOR LAW.

1900.

63 & 64 Vict. c. 12, ss. 51, 90—*Australian Constitution Act* - - - - - 360
See PRIVY COUNCIL APPEALS. 5.
63 & 64 Vict. c. 51, s. 1—*Moneylenders* - 461
See MONEYLENDER.

1901.

1 Edw. 7, c. 13, s. 13—*Aliens* - - 542
See PRIVY COUNCIL APPEALS. 12.

II. COLONIAL STATUTES.

Australia, Statutes of:

Commonwealth Acts, Nos. 11 and 14 of 1902 - - - - - - - 360
See PRIVY COUNCIL APPEALS. 5.
Constitution Act (63 & 64 Vict. (Imperial), c. 12), ss. 51, 90 - - 360
See PRIVY COUNCIL APPEALS. 5.
Land Transfer Act, 1893, s. 211 - - 503
See PRIVY COUNCIL APPEALS. 2.
Western Australia Land Transfer Act, 1874 - - - - - - - 503
See PRIVY COUNCIL APPEALS. 2.

British Honduras, Statutes of:

Consolidated Laws of British Honduras, Part VI., c. 13, s. 213 - - - 515
See PRIVY COUNCIL APPEALS. 6.

Canada, Statutes of:

British North America Act, 1867, ss. 91, 92, 108 - - - - - - 204
See PRIVY COUNCIL APPEALS. 8.
—— ——, ss. 108, 117 - - - - - 552
See PRIVY COUNCIL APPEALS. 8.
Civil Code of Lower Canada, art. 1018 - 100
See PRIVY COUNCIL APPEALS. 7.
Dominion Act, 1881 (44 Vict. c. 1), s. 18 (*a*) - - - - - - 204
See PRIVY COUNCIL APPEALS. 8.

STATUTES—*continued.*
Dominion Act, 1897 (60 & 61 Vict. c. 11 (Alien Labour), s. 6, amended by 1 Edw. 7, c. 13, s. 13) - - - 512
See PRIVY COUNCIL APPEALS. 12.
Ontario Act, 36 Vict. c. 102, s. 5 - - 110
See PRIVY COUNCIL APPEALS. 13.
Ontario Judicature Act (Revised Statutes of Ontario, 1897, c. 51), s. 113 - 117
See PRIVY COUNCIL APPEALS. 11.
Quebec Civil Code, art. 1056 - - - 187
See PRIVY COUNCIL APPEALS. 15.
—— —, arts. 2227, 2232, 2236 - - 241
See PRIVY COUNCIL APPEALS. 17.
Quebec Act, 1889 (52 Vict. c. 79), ss. 120, 144, 231 - - - - - 241
See PRIVY COUNCIL APPEALS. 17.
Quebec Act, 1901 (1 Edw. 7, c. 67)- - 196
See PRIVY COUNCIL APPEALS. 14.
Natal, Statutes of:
Natal Mines Act, 1899, s. 25 - - - 511
See PRIVY COUNCIL APPEALS. 21.
New South Wales, Statutes of:
New South Wales Public Works Act, 1900, s. 131 - - - - - 249
See PRIVY COUNCIL APPEALS. 22
New South Wales Act (2 Edw. 7, No. 35), s. 24 - - - - - - - 378
See PRIVY COUNCIL APPEALS. 23.
New Zealand, Statutes of:
New Zealand Land and Income Assessment Act, No. 49 of 1900, s. 59 - 526
See PRIVY COUNCIL APPEALS. 25.

STREET — Cost of Improvements — Action to recover assessed amounts — Laws of Canada - - - - - 241
See PRIVY COUNCIL APPEALS. 17.

STRIKE—Inducing workmen to breach of contracts with employers—Trade Union 384
See EMPLOYER AND WORKMAN. 3.

SUPPORT—Mines—Right to support of surface —Damage—Compensation - - 305
See INCLOSURE ACT.

TASMANIA—Laws of - - - - 92
See PRIVY COUNCIL APPEALS. 27.

TAXES.
See under REVENUE.

TENANT—Landlord and.
See under LANDLORD AND TENANT.

TRADE—Income tax—Deductions—Loss arising from negligence — Hotel — Injury to guest—Damages - - - - 448
See REVENUE. 4.

—— Restraint of.
See under RESTRAINT OF TRADE.

TRADE UNION—Authority of branch officials to bind union—Ratification - - 384
See EMPLOYER AND WORKMAN. 3.

TRAMWAYS—*Local Authority—Sale of Tramways within a District—Payment by Local Authority for Buildings outside the District—Tramways Act,* 1870 (33 & 34 *Vict. c.* 78), *s.* 43.
Where in pursuance of s. 43 of the Tramways Act, 1870, the local authority require the promoters of a tramway in any district to sell so much of the tramway works and undertaking as is within the district, the payment by the local authority to the promoters must include the value of buildings of the promoters, which, though situated outside the district, are suitable to and used by the promoters for the purposes of their undertaking within the district. MANCHESTER CARRIAGE AND TRAMWAYS COMPANY *v.* SWINTON AND PENDLEBURY URBAN DISTRICT COUNCIL - - - - - H. L. (E.) 277

TRANSFER—Land transfer—Western Australia Land Transfer Act — Liability of Registrar of titles - - - 503
See PRIVY COUNCIL APPEALS. 2.

TRANSVAAL—Laws of - - - - 494
See PRIVY COUNCIL APPEALS. 28.

TRESPASS—Action for—Injunction — Arbitration clause—Failure of company to proceed under their Act—Law of Canada 110
See PRIVY COUNCIL APPEALS. 13.

—— Seashore—Title to foreshore under a Crown grant—Construction - - 92
See PRIVY COUNCIL APPEALS. 27.

TRIAL—New trial must be on motion—Law of British Honduras - - - 515
See PRIVY COUNCIL APPEALS. 6.

—— New trial ordered — Action for wrongful dismissal—Duty of the trial judge 122
See PRIVY COUNCIL APPEALS. 24.

TRUCK ACTS—Deduction from wages—Set-off — Debt due from workman to employer - - - - - 136
See EMPLOYER AND WORKMAN. 4.

TURKS AND CAICOS ISLANDS—Laws of 254
See PRIVY COUNCIL APPEALS. 29.

UNDUE INFLUENCE—Will, Validity of—Evidence of executors inadmissible—Laws of Jersey - - - - - 169
See PRIVY COUNCIL APPEALS. 20.

UNFURNISHED HOUSE—Defective premises—Personal injury to tenant's wife—Landlord not liable - - - - 428
See LANDLORD AND TENANT.

UNION — Trade union — Authority of branch officials to bind union—Ratification 384
See EMPLOYER AND WORKMAN. 3.

USER —Title to foreshore under a Crown grant —Improper rejection of evidence—Acts of user before the grant admissible 92
See PRIVY COUNCIL APPEALS. 27.

VICTORIA—Laws of - - - - - **105**
See PRIVY COUNCIL APPEALS. 30.

WAGES—Truck Acts—Deduction from wages—Set-off—Debt due from workman to employer - - - - - - **136**
See EMPLOYER AND WORKMAN. 4.

WAIVER—Prospectus—Non-disclosure of contracts — Directors' liability — Waiver clause - - - - - - **24**
See COMPANY. 2.

WATER — River — Rights of riparian proprietors - - - - - - - - **72**
See RIVER.

—— Salmon fishing—Impeding passage of fish by abstraction of water - - **478**
See FISHERY.

WESTERN AUSTRALIA—Land transfer - **503**
See PRIVY COUNCIL APPEALS. 2.

WIFE—Husband and.
See under HUSBAND AND WIFE.

WILL—Validity of—Undue influence—Evidence of executors inadmissible — Laws of Jersey - - - - - - **169**
See PRIVY COUNCIL APPEALS. 20.

WORDS—"Building" - - - - - - **1**
See BURIAL.

—— "Engineering work" - - - **325**
See EMPLOYER AND WORKMAN. 2.

—— "House" - - - - - - - **299**
See RATES. 4.

—— "Inhabitant" - - - - - **299**
See RATES. 4.

—— "serious and wilful Misconduct" - **409**
See EMPLOYER AND WORKMAN. 1.

—— "Occupier" - - - - - **299**
See RATES. 4.

—— "Residence" - - - - - **455**
See REVENUE. 3.

—— "Satisfaction" - - - - **187**
See PRIVY COUNCIL APPEALS. 15.

—— "approved Service" - - - **291**
See POLICE.

—— "exercise and Vend" - - - **419**
See PATENT.

WORKMAN—Employer and.
See under EMPLOYER AND WORKMAN.

BRADBURY, AGNEW & CO. LD. PRINTERS, LONDON AND TONBRIDGE.

BIBL. LOMBIN UNIV.